

3. Plaintiffs' Conspiracy Allegations Need Not Be Detailed Defendant By Defendant

Contrary to Defendants' assertions, detailed pleading of each Defendant's participation in the conspiracy is not a requirement. That point was recently addressed in *Flash Memory*, 2009 WL 1096602 at *5 n. 7, where the court stated:

In addition to the joint motion to dismiss, Toshiba, Mitsubishi, Hitachi, SanDisk and Hynix filed their own, separate motions to dismiss. The arguments adduced in those motions overlap with those presented in the joint submission. Their central point of contention appears to be the lack of specific allegations directed at their particular company. This argument fails. For pleading purposes, allegations of antitrust conspiracy need not be detailed on a "defendant by defendant" basis. *See SRAM*, 580 F. Supp. 2d at 903-907 (rejecting argument plaintiffs must allege each defendant's specific role in an antitrust conspiracy); *accord In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 822 (3rd Cir. 1982); *In re [NASDAQ] Market-Makers Antitrust Litig.*, 894 F. Supp. 703, 712 (S.D.N.Y. 1995).

Accord, e.g., OSB, 2007 WL 2253419 at *5 ("[a]ntitrust conspiracy allegations need not be detailed defendant by defendant").²¹

Defendants rely on cases like *Jung v. Association of American Medical Colleges*, 300 F.Supp.2d 119 (D.D.C. 2004) ("*Jung*") or *TFT-LCD I*. Their reliance is misplaced. In *Jung*, the district court stated that a plaintiff "need not allege overt acts committed by each defendant in furtherance of a conspiracy," 300 F.Supp.2d at 164 n. 27 (citing *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 1475705 (D.D.C. 2000) ("*Vitamins II*"); *see also Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.*, 253 F.Supp.2d 262, 278 (D.Conn.2003). And as for *TFT-LCD I*, while the court did say that a plaintiff must allege that each defendant joined the conspiracy and played some part in it (586

²¹ *See also In re Mercedes-Benz Antitrust Litig.*, 157 F.Supp. 2d 355, 375 (D.N.J. 2001) ("the short answer is that plaintiffs have alleged that all of the named defendants were participants in the conspiracy. That a particular defendant may or may not have joined in a specific event or act in furtherance of the conspiracy, such as attending a meeting, does not affect its status as a conspirator"); *Aspartame*, 2007 WL 5215231 at *9- *10 (E.D. Pa Jan. 19, 2007) ("to require plaintiffs' to name each defendant each time [the complaint] refers to the conspiracy would be repetitive and patently unnecessary...since the complaint alleges that the defendants took these actions and includes Holland as a defendant, the complaint gives Holland fair notice of the plaintiffs' claim and the grounds upon which it rests").

1 F.Supp.2d at 1117), that requirement posed no onerous burden and does not require the
 2 pleading of evidentiary detail. This point is illustrated by the same court's subsequent
 3 opinion in *TFT-LCD II*:

4 Defendants contend that the amended consolidated
 5 complaints do not adequately allege each defendant's role
 6 in the alleged conspiracy. Defendants argue that the
 7 amended complaints continue to "lump together" the
 8 twenty-six different named defendants in general
 9 allegations referring to "defendants," or groups of
 10 defendants sorted by country or corporate family. All
 11 plaintiffs counter that the new paragraphs added to the
 12 amended complaints sufficiently allege each defendant's
 13 participation and role in the alleged conspiracy.

14 The Court finds that the amended consolidated complaints
 15 more than adequately allege the involvement of each
 16 defendant and put defendants on notice of the claims
 17 against them. Contrary to defendants' suggestion, neither
 18 *Twombly* nor the Court's prior order requires elaborate fact
 19 pleading. Further, the Supreme Court has recognized that
 20 "in complex antitrust litigation," "motive and intent play
 21 leading roles," and "the proof is largely in the hands of the
 22 alleged conspirators." *Poller v. Columbia Broad. Sys., Inc.*,
 23 368 U.S. 464, 473...(1962).

24 599 F.Supp.2d at 1184.

25 This view is a sensible one. "[A]n antitrust complaint should be viewed as a
 26 whole, and the plaintiff must allege that each individual defendant joined the conspiracy
 27 and played some role in it." *OSB*, 2007 WL 2253419 at *5. Pleading particular overt acts
 28 by each defendant is unnecessary, "because a single overt act by just one of the
 29 conspirators is enough to sustain a conspiracy claim even on the merits." *Vitamins*, 2000
 30 WL 1475705 at *11.

31 Likewise, it is not necessary to plead each defendant had a role in "every detail in
 32 the execution of the conspiracy . . . to establish liability, for each conspirator may be
 33 performing different tasks to bring about the desired result." *Beltz*, 620 F. 2d 1at 1367.
 34 Plaintiffs need only plead "the existence of a conspiracy in violation of the antitrust laws
 35 and that [defendants] were a part of such a conspiracy, [defendants] will be liable for the
 36 acts of all members of the conspiracy in furtherance of the conspiracy, regardless of the
 37 nature of [defendants'] own actions."). *Id.*; see also *Rubber Chems.*, 504 F. Supp.

2d at 790 (allegations of defendant's involvement in agreement to implement price increases and other allegations of "general participation" in conspiracy sufficient to state antitrust claim); *Commercial Explosives*, 945 F. Supp. at 1492 (alleging acts of conspiracy by defendants generally "fairly informs [one defendant] that it is accused of engaging in a conspiracy to fix the prices of commercial explosives and that it did so by such activities as meeting with competitors to discuss and agree on prices; discussing the setting of prices over the telephone, exchanging pricing documents, agreeing to raise prices. . . .") See also *Flat Glass*, 385 F.3d at 363 ("If six firms act in parallel fashion and there is evidence that five of the firms entered into an agreement, for example, it is reasonable to infer that the sixth firm acted consistent with the other five firms' actions because it was also a party to the agreement. That is especially so if the sister firm's behavior mirrored that of the five conceded coconspirators.").²²

4. On The Issue Of Allegations Linking Each Defendant To A Conspiracy, TFT-LCD II And Flash Memory Are Particularly Pertinent Here.

The decisions in *TFT-LCD II* and *Flash Memory* are particularly pertinent on the issue of whether plaintiffs are required to detail each defendant's involvement in an alleged price fixing conspiracy.

²² There is no logical reason why any Defendant should be unable to formulate a response to Plaintiffs' claims and prepare a defense. This is especially true because Defendants, having met and communicated in secret, are uniquely positioned to know more about the conspiracy than Plaintiffs. Courts recognize that pleading standards are relaxed where facts are "peculiarly within the defendant's knowledge or control." *Hill v. Morehouse Med. Assoc., Inc.*, No. 02-14449, 2003 WL 22019936, at *3 (11th Cir., Aug. 15, 2003) (citing *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1052 (S.D. Ga. 1990)). Accord, *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999). Although these were fraud cases where Rule 9's heightened pleading standard was applied, their reasoning as to why the pleading threshold was lowered should govern here because Rule 8 and Rule 9 are intended to serve the same purpose – to provide notice to defendants. See *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996) ("Rule 9(b) serves to give defendants adequate notice to allow them to defend against the charge..."). The complete details of Defendants' price-fixing conspiracy rest within Defendants' knowledge and control. As a result, Plaintiffs' allegations of each Defendant's role in the conspiracy, together with detailed information about conspiratorial acts, more than satisfy the notice requirement of Rule 8.

As noted above, in *TFT-LCD II*, Judge Illston denied renewed motions to dismiss, finding that plaintiffs “adequately allege the involvement of each defendant and put defendants on notice of the claims against them,” citing several types of allegations to support its denial of the motions to dismiss, including:

- Details about numerous illicit conspiratorial communications between and among defendants;
- Facts of guilty pleas;
- Information about the group and bilateral conspiratorial meetings, including that the group meetings were attended by employees at three levels of defendants’ corporations, and the structure and content of the meetings;
- Conspiratorial group meetings were supplemented by bilateral discussions about pricing, in the form of in-person meetings, telephone calls, and e-mails;
- The types of meetings among the defendants, including in some instances the year of a meeting; and
- That the individual participants in the conspiratorial meetings did not always know the corporate affiliation of their counterparts, nor did they distinguish between the entities within a corporate family

599 F. Supp. 2d at 1184-85

The amended complaint herein contains strikingly similar allegations. *See* Saveri Decl., Exh. 3, Chart Comparing Allegations in amended complaints in *TFT-LCD II* and this case; *TFT-LCD* First Amended Direct Purchaser Plaintiffs’ Consolidated Complaint attached as Ex. 4 to the Saveri Decl. Applying the reasoning of *TFT-LCD II*, Defendants’ motions to dismiss should be denied in the instant action as well.

As Judge Illston stated in *TFT-LCD II*:

Defendants complain that the amended complaints still do not differentiate between related corporate entities. As described in the amended complaints, the alleged conspiracy was organized at the highest level of the defendant organizations and carried out by both executives and subordinate employees. The amended complaints allege that the conspiracy was implemented by subsidiaries and distributors within a corporate family, and that “individual participants entered into agreements on behalf of, and reported these meetings and discussions to, their respective corporate families.” DP-CAC ¶ 130; see also

IPSACC ¶¶ 96, 100. Plaintiffs also allege that “the individual participants in conspiratorial meetings and discussions did not always know the corporate affiliation of their counterparts nor did they distinguish between the entities within a corporate family.” *Id.* The amended complaints allege a complex, multinational price-fixing conspiracy and, taken as a whole, they sufficiently allege each defendants’ participation in that conspiracy, as well as present a factual basis for the allegations of agency.

599 F.Supp. 2d at 1185. The complaint contains the exact language here. DP-CAC ¶ 154.

Similarly, the court in *Flash Memory* rejected defendants’ argument “that the pleadings fail to allege the specific time, place, or person who had any meetings or communications regarding flash memory pricing or output.” 2009 WL 1096602 at *4. There, the court found a complaint sufficient to give rise to a plausible suggestion of conspiracy under *Twombly* where it, like the DP-CAC herein, alleged: (1) the companies and/or individuals directly involved in setting price for NAND flash memory; (2) the time frame of the anticompetitive conduct; (3) facts about the coordination of production as a means to control pricing; and (4) facts showing that the market was conducive to coordinated pricing, including a concentrated market dominated by a few entities with significant barriers to entry. *Id.* at *4-*5.²³

The antitrust cases cited by Defendants involved amended complaints that rested solely on allegations of parallel conduct. See *Kendall v. Visa U.S.A, Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (“*Kendall*”) (holding that plaintiffs “failed to plead any evidentiary

²³ In *Iqbal*, while the Supreme Court held that the complaint did not contain sufficient facts plausibly showing that petitioners Ashcroft and Mueller “purposefully adopted a policy of classifying post-September-11 detainees as ‘of high interest’ because of their race, religion or national origin,” 129 S.Ct. at 1952, the Supreme Court specifically noted that, in the context of a *Bivens* action, “petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic” and that “respondent’s complaint does not contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind.” *Id.* Given the defendant-specific state of mind allegations required in a *Bivens* action, the Court should reject any attempt by Defendants to characterize *Iqbal* as requiring that Plaintiffs’ complaint contain any greater defendant-by-defendant antitrust conspiracy allegations than the detailed allegations contained in the instant complaint.

1 facts beyond parallel conduct to prove their allegation of a conspiracy” and observing
 2 that plaintiffs failed to allege “who, did what, to whom (or with whom), where, and
 3 when” but not requiring such for successful pleading) (emphasis supplied)²⁴; *In re*
 4 *Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007) (“*Elevator*”) (complaint relied
 5 entirely on parallel conduct, conclusory allegations of conspiracy, and reference to
 6 European antitrust investigation where the court found no “linkage” between the
 7 European and U.S. markets for elevators and their maintenance);²⁵ *Mountain View*
 8 *Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir. 1980) (“*Mountain View*
 9 *Pharmacy*”)²⁶ (complaint ““did little more than recite the relevant anti-trust laws””).²⁷

10 ²⁴ In *Kendall*, the plaintiffs alleged a conspiracy predicated solely on the fact that certain
 11 banks who issued Visa and MasterCard credit cards also had a “proprietary interest” in
 12 the Visa and MasterCard “consortiums” and that the consortiums set interchange fees
 13 which they charged to the banks, which were then passed onto the merchants. 518 F.3d at
 14 1048. The Ninth Circuit held that bare allegations of ownership and control of the
 15 consortiums that set fees did not state a Section 1 claim. *Id.* at 1050. The Ninth Circuit
 16 also noted that plaintiffs failed to allege that the banks agreed to abide by or charge the
 17 fees set by the consortiums, thus failing to allege a basic agreement. *Id.* at 1048. *See*
 18 *also In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 373, n.8
 19 (M.D. Pa. 2008) (“*Labelstock*”) (distinguishing *Kendall* from the complaint in that case,
 20 which the court described as “go[ing] beyond allegations of parallel conduct and
 21 describ[ing] market conditions, discussions between [defendants], and other facts that
 22 suggest [defendant] acted pursuant to an agreement”).

17 ²⁵ *See also Flash Memory*, 2009 WL 1096602 at *9 (distinguishing *Elevator* from the
 18 *Flash Memory* complaint which “provide[d] much more detail regarding the
 19 intracompetitor communications directed at coordinating flash memory pricing and facts
 20 regarding the flash memory market structure showing its conduciveness towards
 21 collusive pricing schemes”).

20 ²⁶ Defendants incorrectly ascribe *Mountain View Pharmacy* to the Ninth Circuit, when it
 21 was decided by the Tenth Circuit.

22 ²⁷ The other cases relied upon by Defendants are equally inapposite. *Nasious v. Two*
 23 *Unknown B.I.C.E. Agents*, 492 F.3d 1158 (10th Cir. 2007), involved a *pro se* Section
 24 1983 claim against at least 42 individual defendants “as well as scores of John and Jane
 25 Doe defendants” in a complaint described as “[n]o model of clarity.” *Id.* at 1160-61; *see*
 26 *also id.* at 1163 (describing the complaint at issue as “rambling, and sometimes
 27 incomprehensible”). Nevertheless, the Tenth Circuit held that the district court
 28 improperly dismissed the complaint with prejudice and reversed and remanded for further
 proceedings. The language cited by Defendants (Defs. Br. at 30) was actually the Tenth
 Circuit chastising the district court for failing to explain to the *pro se* litigant, in layman’s
 terms, the types of allegations that would “permit[] the defendant sufficient notice to
 begin preparing its defense and the court sufficient clarity to adjudicate the merits.” 492
 F.3d at 1163. In *In re Sagent Tech. Derivative Litig.*, 278 F. Supp. 2d 1079, 1094-95
 (N.D. Cal. 2003), cited for the proposition that that the “lumping’ related groups of
 defendants together is wholly improper,” (Defs. Br. at 30), the court dismissed plaintiffs’

1 In sum, Plaintiff's allegations are more than specific enough to put Defendants on
 2 fair notice of the claims against them. Plaintiffs "only need to make allegations that
 3 plausibly suggest that each Defendant participated in the alleged conspiracy." *SRAM*, 580
 4 F. Supp. 2d at 904. Viewed in its totality, Plaintiffs' amended complaint contains more
 5 than sufficient allegations to demonstrate that each Defendant joined the conspiracy and
 6 played some role in it. *See TFT-LCD II*, 599 F. Supp. 2d at 1184-85.²⁸

7 **E. The Amended Complaint More Than Adequately Alleges The**
 8 **Involvement Of Each Moving Defendant In The Claimed Conspiracy.**

9 **1. BMCC**

10 When the DP-CAC is viewed in its entirety, Beijing Matsushita Color CRT Co.,
 11 Ltd. ("BMCC") cannot reasonably question why it has been sued. The amended
 12 complaint totals 222 paragraphs of detailed allegations, describing the conspiracy and
 13 BMCC's role and participation in it. Instead of confronting the amended complaint in its
 14 entirety, BMCC would have this Court consider in isolation only two paragraphs of it.
 15 As noted above, such an approach is contrary to well-established standards.

16 BMCC's statute of limitations argument also fails. This argument is based on a
 17 typographical error in paragraph 173 of the DP-CAC. That paragraph says BMCC
 18 attended conspiratorial meetings between 1998 and 2001. It should read that such
 19 meetings occurred between 1998 and 2007. Saveri Decl., ¶ 10. The indirect purchaser
 20 complaint so reads and BMCC has not attacked it on statute of limitations grounds. If
 21 necessary, Plaintiffs ask the Court to permit them to amend the DP-CAC to make this

22 claims for fiduciary breach because "[o]f the six sitting members of the board, only two
 23 were on the board during the period October 1999 through February 2000, when the
 24 alleged misappropriation/insider trading/waste of corporate assets occurred." *Id.* at 1093.
 25 Finally *Dell, Inc. v. This Old Store, Inc.*, No. H-07-0561, 2007 WL 1958609 at *2 (S.D.
 26 Tex., July 2, 2007), involved fraud claims evaluated under Rule 9, which is a higher
 27 pleading standard than Rule 8 and requires that "the circumstances constituting fraud or
 28 mistake shall be stated with particularity."

²⁸ Nonetheless, should the Court determine that the amended complaint is insufficient in
 any way, Plaintiffs respectfully request leave to amend. Fed. R. Civ. P. 15(a) provides
 that leave to amend "shall be freely given when justice so requires," and the Ninth Circuit
 has held that leave to amend should be granted with "extreme liberality." *Eminence
 Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).

correction. In any event, BMCC's limitations argument should fail for other reasons. Its assertion that Plaintiffs' allegations establish as a matter of law that it withdrew from the alleged conspiracy by 2002, and, therefore, that the statute of limitations has run, grossly misreads the complaint – it alleges the opposite – and mischaracterizes the law. BMCC's assertion that Plaintiffs have not adequately alleged fraudulent concealment also fails.

a. Plaintiffs' Factual Allegations As To BMCC.

Plaintiffs allege that Defendants, who control the majority of the CRT industry, conspired to fix the prices of CRT Products. As noted above, the DP-CAC details the many collusive contacts, meetings and agreements among members of the CRT Products Industry, including BMCC. *See id.* ¶¶ 134-153. Among other things, Plaintiffs describe the various meetings known as "Glass Meetings" organized and attended by CRT makers.²⁹ Plaintiffs also allege that Defendants, including BMCC, reached "[a]greements as to CRT Products" at these and other meetings. *Id.* ¶ 140.

Plaintiffs also specifically allege that BMCC participated in over 20 illegal bilateral and group meetings between 1998 and 2001 (as noted above, this should read "2007"). DP-CAC ¶ 173. Plaintiffs further allege that, during these more than 20 bilateral and group meetings, "unlawful agreements as to, *inter alia*, price, output restrictions, and customer and market allocation of CRT Products (including CDT Products and CPT Products) occurred." *Id.* Plaintiffs allege the location of the meetings – China – and that BMCC never effectively withdrew from the conspiracy. *Id.*

BMCC's arguments that Plaintiffs have not met their pleading requirements ignore and mischaracterize these allegations. First, its assertion that Plaintiffs have not

²⁹ Plaintiffs allege, and BMCC admits, that BMCC was a CRT producer. *Id.* ¶ 80; *see* "Beijing Matsushita Color CRT Co., Ltd.'s Motion To Dismiss The Direct Purchaser Plaintiffs' Consolidated Amended Complaint And The Indirect Purchaser Plaintiffs' Consolidated Amended Complaint", p. 2 (May 18, 2009) ("BMCC Mot."). Plaintiffs also allege that "[d]uring the Class Period, BMCC manufactured, sold, and distributed CRT Products either directly or through its subsidiaries or affiliates throughout the United States." *Id.* ¶ 80.

1 alleged that BMCC was a party to any illegal agreements because paragraph 173 of the
 2 DP-CAC alleges only that it “participated” in over twenty meetings at which illegal
 3 agreements “occurred” is frivolous. Not only does BMCC ignore the many allegations
 4 throughout the complaint that “Defendants”, including BMCC, were parties to illegal
 5 agreements, (*see e.g.*, DP-CAC ¶¶ 134-153), BMCC misreads paragraph 173. The clear
 6 import of that paragraph is that BMCC’s “participation” extended to the illegal
 7 agreements, especially when considered in the overall context of a complaint expressly
 8 alleging illegal price fixing agreements among all Defendants. BMCC’s pinched
 9 interpretation of paragraph 173 also violates a cardinal principle on a motion to dismiss:
 10 that the complaint must be read broadly and all reasonable inferences drawn in the
 11 plaintiffs’ favor. *Operating Engineers’ Pension Trust Fund v. Clark’s Welding &*
 12 *Machine*, 2009 WL1324049, at *2.

13 Second, BMCC’s argument that Plaintiffs have not supplied sufficient detail
 14 regarding BMCC’s participation in the conspiracy also fails. As explained above, the law
 15 does not require the specificity BMCC demands. This argument also ignores the
 16 extraordinarily detailed description of the alleged conspiracy in the complaint, as well as
 17 the specific details regarding BMCC. When the complaint is viewed as a whole, it is
 18 clear that BMCC is alleged to be a participant in a plausible conspiracy.³⁰

19 Viewing the amended complaint as a whole, Plaintiffs’ allegations are more than
 20 sufficient to establish the nature of the CRT Products conspiracy, how the conspiracy
 21 operated, the products involved, and that BMCC joined and participated in it.³¹

22 ³⁰ BMCC misapplies the quote it attributes to *Kendall*. The Ninth Circuit did *not* hold
 23 that a plaintiff must plead the “basic questions” as to each defendant, as BMCC states
 24 (*see* BMCC’s Mot. at 4); rather, the court held that a plaintiff must plead the “basic
 25 questions” in the complaint: “[e]ven after the depositions taken, the complaint does not
 26 answer the basic questions: who, did what, to whom (or with whom), where, and when?”
 27 518 F.3d at 1048.

28 ³¹ BMCC’s reliance on Judge Armstrong’s opinion in *In re Late Fee & Over-Limit Fee*
Litig., 528 F. Supp 2d 953 (N.D. Cal. 2007) (“*Late Fee*”) is similarly misplaced. Like
Kendall, in *Late Fee*, plaintiffs failed to allege any agreement among the defendants. *Id.*
 at 961. The “heart of plaintiffs’ antitrust allegations” in *Late Fee* was a “chart of
 allegedly current late-fee levels of six defendant banking organizations,” which the court
 found to allege “merely parallel conduct.” *Id.* at 962. Accordingly, the court dismissed.

b. The Claims Against BMCC Are Not Time-Barred

BMCC's argument that Plaintiffs' claims against it are barred by the statute of limitations is likewise without merit, even apart from the typographical error on which it depends. BMCC's contention that the Court should conclude as a matter of law that it withdrew from the conspiracy based on Plaintiffs' allegations that it participated in more than twenty illegal conspiratorial meetings with its co-defendant/co-conspirators between 1998 and 2001, and that it never withdrew from the conspiracy, is an argument that "up" is "down." It also ignores the stringent requirements the law imposes for withdrawal from a conspiracy, which preclude such a finding on a motion to dismiss. BMCC's contention that Plaintiffs' allegations of fraudulent concealment are inadequate and insufficient to toll the statute of limitations is also incorrect.

i. Withdrawal.

There is no basis in the Complaint to find that BMCC withdrew from the alleged conspiracy at any time. The DP-CAC alleges that BMCC attended conspiratorial meetings from 1998 through 2001. (DP-CAC at ¶ 173) It also expressly alleges that BMCC never withdrew from the conspiracy. *Id.* These allegations – and BMCC relies on no others – simply cannot support a conclusion that it withdrew from the conspiracy at any time, much less early enough to implicate the statute of limitations. Indeed, the fact that the complaint (erroneously) does not identify any conspiratorial conduct by BMCC after 2001 cannot even support a conclusion that that BMCC's participation ceased. The complaint reflects Plaintiffs' present knowledge – unaided by any discovery – of BMCC's secret conduct; it does not by any means constitute a positive assertion that BMCC never committed another conspiratorial act. Moreover, as even BMCC must

the complaint because the complaint failed to include the necessary details. *Id.* In *Flash Memory*, in a case analogous to this one, Judge Armstrong distinguished her opinion in *Late Fee* on this basis. *Flash Memory*, 2009 WL 1096602 at *9. Similarly, in *Jung*, another case upon which BMCC relies, the court merely held that while it "must" consider individual motions to dismiss in the context of the larger conspiracy the plaintiffs were still obligated to allege "that each individual defendant joined the conspiracy and played some role in it." 300 F. Supp. 2d at 164.

1 acknowledge, the complaint alleges continuing conduct by BMCC and its co-
 2 conspirators, including agreements related to future conduct. At the very least,
 3 construing the complaint in Plaintiffs' favor as required, these allegations establish that
 4 BMCC's conspiratorial conduct continued well beyond 2001.

5 Understandably, BMCC cites no authority in support of this argument because it
 6 is well settled that mere cessation of conspiratorial activity by a defendant is insufficient
 7 to establish withdrawal.³² Thus, even if the allegation in the DP-CAC on which BMCC
 8 hangs its proverbial hat is construed to allege that BMCC ceased participation in the
 9 conspiracy after 2001 (an inference in favor of BMCC that is impermissible on a motion
 10 to dismiss), it still can point to nothing in the DP-CAC that establishes BMCC's
 11 withdrawal from the conspiracy as a matter of law.³³

12 Withdrawal is an affirmative defense, and the burden of proof is on the defendant.
 13 *See United States v. Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980); *United States v. Basey*,
 14 613 F.2d 198, 202 (9th Cir. 1979) ("*Basey*"); *Armco Steel Co. L.P. v. CSX Corp.*, 790 F.
 15 Supp. 311, 322 (D.D.C. 1991) ("*Armco Steel*"). Courts have stressed that the burden of
 16 proving withdrawal is "stringent" and "rigorous" for "[t]he defendant cannot set in
 17 motion a criminal scheme and then limit its responsibilities for the harm cause by the
 18 scheme by simply ceasing to participate in the scheme." *Id.* The withdrawal inquiry is
 19 normally fact intensive and thus usually inappropriate for determination on the pleadings.
 20 *See, e.g., id.* at 321-23 (ambiguities in conduct alleged in amended complaint precluded

21 ³² *See, e.g., United States v. Zimmer*, 299 F.3d 710, 718 (8th Cir. 2002); *Morton's*
 22 *Market Inc. v. Gustafson's Dairy Inc.*, 198 F.3d 823, 828 (11th Cir. 1999) ("*Morton's*
 23 *Market*"); *United States v. Dunn*, 758 F.2d 30, 37-38 (1st Cir. 1995); *United States v. Sax*,
 39 F.3d 1380, 1386 (7th Cir. 1994) ("*Sax*"); *United States v. Handler*, 1978 WL 5690 *19
 (C.D. Cal. Aug. 3, 1978) ("*Handler*").

24 ³³ Four other Defendant groups (Hitachi, LG, Philips and Toshiba) also argue that they
 25 should be dismissed based on the premise that, before the start of the limitations period,
 26 they withdrew from the conspiracy because (generally) they joint ventured, spun-off or
 27 otherwise "ceased" CRT manufacture. As explained below, none of these transactions
 28 rises to the level necessary to sustain a defense of withdrawal as a matter of law. Rather
 than belabor the Court with five restatements of the applicable law, Plaintiffs concentrate
 that discussion here for the sake of brevity. Application of the law to each Defendant
 will be made in conjunction with the response to its separate brief.

determination that defendant withdrew from conspiracy as a matter of law); *Handler*, at *51-*52 (denying motion to dismiss on grounds that validity of withdrawal defense raised questions of fact that could only be fairly and adequately assessed at trial); *United States v. Shaw*, 106 F. Supp. 2d 103, 123 (D. Mass. 2000) (denying defendant's motion to dismiss indictment on ground that defendant withdrew from the conspiracy because withdrawal turned on issues of fact).

To prove withdrawal from an antitrust conspiracy, the defendant must show "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978); see also *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 839 (11th Cir. 1999) ("*Morton's Market*") ("the law has given effect to a conspirator's abandonment of the conspiracy only where the conspirator can demonstrate that he retired from the business, *severed all ties to the business*, and deprived the remaining conspirator group of the services which he provided to the conspiracy"); *United States v. Young*, 39 F.3d 1561, 1571 (11th Cir. 1994) (holding that withdrawal is not available to a defendant who merely ceases to participate, but does not affirmatively withdraw); see also *Basey*, 613 F.2d at 202 ("participation in the conspiracy is presumed to continue until the last overt act of the conspirators unless [the defendant] produces affirmative evidence of withdrawal."). "To withdraw from a conspiracy a defendant must either disavow the unlawful goal of the conspiracy, affirmatively act to defeat the purpose of the conspiracy or take definite, decisive and positive steps to show that the defendant's dissociation from the conspiracy is sufficient." *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) ("*Lothian*"). Accord *United States v. Flores*, 279 Fed. Appx. 443 (9th Cir. 2008).

In the context of a conspiracy which is carried out through the regular activities of otherwise legitimate business, the courts have found withdrawal only where a conspirator can prove that it completely retired from the business, severed all ties to the business, and deprived the remaining conspirators of the services which it had previously

provided to the conspiracy. *United States v. Lowell*, 649 F.2d 950, 955 (3rd Cir. 1981) (“where fraud constitutes the standard operating procedure of a business enterprise, affirmative action sufficient to show withdrawal as a matter of law from the conspiracy embodied in the business association may be demonstrated by the retirement of a co-conspirator from the business, severance of all ties to the business and consequent deprivation to the remaining conspirator group of the services that constituted the retiree’s contribution to the fraud.”); *Lothian*, 976 F.2d at 1264 (quoting the above passage from *Lowell* with approval); *In re High Fructose Corn Syrup Antitrust Litig.*, 293 F. Supp. 2d 854, 860-61 (C.D. Ill. 2003).

Numerous courts have held that a defendant’s sale of a business, or resignation from an enterprise, does not constitute effective withdrawal, especially when the defendant continues to be involved in or receives benefits from the successor business or from the enterprise. *See United States v. Antar*, 53 F.3d 568, 583 (3d Cir. 1995) (“*Antar*”) (holding that that resignation from enterprise did not constitute withdrawal, where defendant “did not sever all his ties with the enterprise”); *Sax*, 39 F.3d at 1387 (7th Cir. 1995) (holding that defendant did not withdraw from conspiracy by selling illegal drug business); *United States v. Eisen*, 974 F.2d 246, 269 (2d Cir. 1992) (holding that defendant-attorney had not withdrawn from a conspiracy when he “continued to be entitled to a percentage of the recovery on all cases he tried including those giving rise to his pre-[resignation] racketeering acts”) (internal quotation marks omitted).

Moreover, in determining whether there has been withdrawal, as a matter of law, from a conspiracy, a court must consider any “post-retirement” acts of a defendant which bear on the question of whether the defendant has truly repudiated the object of the conspiracy.³⁴ Thus, for example, combining forces with another defendant to form a joint

³⁴ *See United States v. Bullis*, 77 F.3d 1553, 1561-63 (7th Cir. 1996) (in case alleging price fixing on dairy products, defendant leaving his job with dairy did not constitute withdrawal as a matter of law because defendant continued telephone calls with co-conspirators in which he expressed concern over a pending price fixing investigation and hinted that the conspiracy ought to be covered up.); *Antar*, 53 F.3d at 583 (“analysis of these cases leads to the following principals: (1) resignation from the enterprise does not, in and of itself constitute withdrawal from a conspiracy as a matter law; (2) total severing

1 venture, does not constitute effective withdrawal. Indeed, continuing the business through
 2 a joint venture is a fact that supports a plaintiff's conspiracy allegations. *See Flash*
 3 *Memory*, 2009 WL 1096602, at *6-*9 (finding that joint ventures and cross-licensing
 4 agreements can be used to facilitate collusive behavior). In *Flash Memory*, plaintiffs
 5 alleged that joint venture and cross-licensing agreements were used to maintain and
 6 achieve the aims of the conspiracy by controlling supply, and thereby permitting
 7 increases in price. *Id.* at *8. Furthermore, *Flash Memory* holds that it was plausible to
 8 conclude that the formation of a joint venture by two defendants in that case "was itself a
 9 conspiratorial act to control prices and supply." *Id.* at *27 n.9.

10 Further illustration of the relevance of "post-retirement" conduct is found in
 11 Magistrate Judge Hay's report and recommendation in *In re NBR Antitrust Litig.*, No.
 12 03-1898, (W.D. Pa) (Dkt. No. 170) ("*NBR*"), adopted by the district court on September
 13 28, 2005 (Dkt. No. 226), attached as Exh. 5 to Saveri Decl. *NBR* was a price fixing
 14 conspiracy case involving synthetic rubber. There, a defendant – relying on its 10 year
 15 contract with another party to sell it all its *NBR* production, transfer its entire customer
 16 base, product technology and contracts to that party – moved to dismiss, contending its
 17 limitations period had run in view of its withdrawal from the alleged conspiracy more
 18

19 of ties with the enterprise may constitute withdrawal from the conspiracy; however, (3)
 20 even if a defendant completely severs...ties with the enterprise, the defendant still may
 21 remain a part of the conspiracy if he or she continues to do acts in furtherance of the
 22 conspiracy and continues to receive benefits from the conspiracy's operations."); *Sax*, 39
 23 F.3d at 1387 (defendant did not withdraw from conspiracy to distribute marijuana by
 24 selling business where he continued to receive profits and participated in laundering of
 25 drug sales proceeds); *United States v. Lash*, 937 F.2d 1077, 1084 (6th Cir. 1991) ("[t]he
 26 Supreme Court has ruled that even if a defendant has taken affirmative action contrary to
 27 a conspiracy it is a jury question whether there was withdrawal if there is evidence that
 28 the defendant acquiesced in the conspiracy after the affirmative act....[H]is subsequent
 acts neutralized his withdrawal and indicated his continued acquiescence."); *United*
States v. Swiss Valley Farms Co., 912 F. Supp. 401, 403 (C.D. Ill. 1995) (where, after
 resuming competitive practices, defendant continued to receive payments on rigged bids,
 resumption of competitive practices could not establish withdrawal as a matter of law as
 it continued to "enjoy the fruits of the charged conspiracy."); *United States v. Anderson*,
 1999 WL 79656 at *3 (D. Kan., Jan. 22, 1999) (defendant's failure to sever all financial
 ties with the conspiracy precluded a finding of withdrawal as a matter of law).

1 than four years before the action was commenced. The court held that the defendant had
 2 not “completely severed its ties with the enterprise of manufacturing and selling NBR”
 3 because it continued to manufacture and sell NBR. *NBR*, slip op. at 8. The Magistrate
 4 Judge pointed out that “the mere fact that [defendant] no longer had the motivation or
 5 opportunity to fix NBR prices does not establish the [defendant] severed all ties with the
 6 business enterprise, particularly as it concededly continues to manufacture NBR”. *Id.* at
 7 9. Neither, the Magistrate Judge noted, did the defendant establish that it had given
 8 notice to its co-conspirators that it had disavowed the object of the conspiracy. *Id.* at 10.
 9 The defendant’s motion to dismiss was therefore denied. *See also Riesman v. United*
 10 *States*, 409 F.2d 789, 793 (9th Cir. 1969) (finding of withdrawal inappropriate where
 11 defendant resigned and ceased to participate in company’s day to day business
 12 operations, but remained a major shareholder and took no affirmative action to disavow
 13 or defeat the activities he joined in setting the unlawful scheme in motion.).

14 In light of these authorities, it is plain that nothing in the complaint comes close to
 15 establishing that BMCC withdrew from the alleged conspiracy as a matter of law.

16 **ii. Fraudulent Concealment.**

17 As explained above, Plaintiffs have adequately pleaded fraudulent concealment.
 18 In particular, as also discussed above, the acts of concealment of BMCC’s co-defendant
 19 co-conspirators, during the course of and in furtherance of the conspiracy are legally
 20 attributable to BMCC as a matter of substantive conspiracy law.³⁵

21 Thus, even assuming *arguendo* that BMCC withdrew from the conspiracy, the
 22 statute of limitations on Plaintiffs’ cause of action did not begin running until November,
 23 2007 because of Defendants’ fraudulent concealment. Accordingly, BMCC is still liable

24
 25 ³⁵ BMCC cites *Metz v. Unizan Bank*, 416 F. Supp. 2d 568 (N.D. Ohio 2006) (“*Metz*”), for
 26 support. But *Metz* does not compel a contrary conclusion. First, *Metz*, a case from the
 27 Northern District of Ohio, is contrary to the recent line of cases in this district – *Rubber*
 28 *Chems.*, *SRAM* and *TFT-LCD I* – that rejects defendant-by-defendant fraudulent
 concealment pleading requirements. Second, it does not appear that the plaintiffs in *Metz*
 even alleged fraudulent concealment, and, therefore, the court never considered the
 sufficiency of their allegations for fraudulent concealment purposes. *Id.* at 577, 579.

1 for antitrust violations that occurred before its alleged withdrawal from the conspiracy.
 2 *See Rubber Chems.*, 504 F. Supp. 2d at 789-90 (citing *Morton's Market, Inc. v.*
 3 *Gustafson's Dairy, Inc.*, 211 F.3d 1224 (11th Cir. 2000) (defendant still liable for
 4 antitrust violations that occurred before it withdrew from price-fixing conspiracy if
 5 statute of limitations was tolled due to fraudulent concealment)). Finally, even assuming
 6 *arguendo* that Plaintiffs' fraudulent concealment allegations are insufficient, BMCC is
 7 still legally responsible for the acts of its co-defendant/co-conspirators in furtherance of
 8 the conspiracy during the four year portion of the conspiracy immediately preceding the
 9 commencement of this action, because it did not withdraw from the conspiracy.

10 2. Samsung Entities

11 Only two Samsung entities ("SE")—Samsung Electronics Co., Ltd. ("SEC") and
 12 Samsung Electronics America, Inc. ("SEAI")—have filed a separate motion to dismiss.
 13 That motion is based primarily on one central false premise: their claim that the price-
 14 fixing conspiracy alleged in the amended complaint is limited to cathode ray tubes
 15 ("CRTs"), and because the SE Defendants did not manufacture CRTs, they are not liable.
 16 However, contrary to the SE Defendants' improper attempt to recast Plaintiffs'
 17 allegations, the DP-CAC clearly and specifically alleges an antitrust conspiracy in the
 18 *CRT Products* market, which includes CRT Products such as computer monitors and
 19 televisions manufactured and sold in the United States by the SE Defendants. *See DP-*
 20 *CAC*, ¶¶ 1-7, 134-175, 181-199. In fact, the complaint alleges that Plaintiffs purchased
 21 CRT Products directly from cartel members (including the SE Defendants) at supra-
 22 competitive prices as a result of a conspiracy to fix and stabilize prices. These allegations
 23 are more than sufficient to plead an antitrust conspiracy in the CRT Products market.

24 The SE Defendants also contend that the complaint fails to allege plausible
 25 grounds for relief because the claimed conspiracy is "economically senseless." However,
 26 to survive a motion to dismiss under *Twombly*, the Complaint need only "state a claim to
 27 relief that is plausible on its face." 550 U.S. at 570. Here, the Complaint alleges both a
 28 logical and economically plausible price-fixing conspiracy in which the SE

Defendants participated. Samsung is a vertically integrated entity that makes and sells CRTs and finished CRT Products. DP-CAC ¶¶ 58-67. Samsung set the prices of CRTs and marked up its CRT Products through its affiliated companies who assembled and sold the finished CRT Products to direct purchasers (like Plaintiffs) at supra-competitive prices. *Id.* ¶¶ 58-67, 82-86, 134-154, 166-67, 176-77, 191-99. The SE Defendants were the Samsung affiliates used to distribute and sell Samsung CRT Products in the United States at supra-competitive prices. Thus, it makes perfect economic sense that the CRT Products made and sold by the SE Defendants incorporated the full amount of the conspiratorial overcharge (*id.* ¶¶ 166-67), which is more than enough to survive a motion to dismiss. *See Commercial Explosives*, 945 F. Supp. at 1492 (alleging acts of conspiracy by defendants generally is sufficient). Indeed, recent decisions in this district, such as *TFT-LCD II* and *Flash Memory*, have upheld similar complaints alleging price-fixing conspiracies among manufacturers and their affiliated distributors.

Further, the SE Defendants ignore the long standing principle of antitrust law holding that direct purchaser damage claims are not reduced or cut off by transactions through corporate affiliates, because it is unlikely that corporate affiliates will sue each other, especially in a price-fixing case. *See Freeman*, 322 F.3d at 1145-46 ("indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation"); *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980) ("*Royal Printing*") ("*Illinois Brick* does not bar an indirect purchaser's suit where the direct purchaser is a division or subsidiary of a co-conspirator."). As stated in the complaint, and as the SE Defendants concede, they are the CRT Product manufacturing and distribution arm of the Samsung family. *See DP-CAC* ¶¶ 58-59; SE Defendants Br. at p. 5. So even if the SE Defendants may not have made CRTs, they did manufacture and sell marked up CRT Products with price-fixed CRTs supplied by their Samsung affiliate – conduct that falls squarely within the horizontal price fixing conspiracy alleged in the Complaint. *See In re TFT-LCD (Flat Panel)*

Antitrust Litig., 2009 WL 533130 (N.D. Cal. Mar. 3, 2009) ("*TFT-LCD III*"). Thus,

under *Royal Printing* and *Freeman*, the SE Defendants are properly named.

Finally, the SE Defendants' assertions that they "purchased" CRTs from their Samsung affiliates and that such "purchases" would supposedly decrease their profit margins is not alleged anywhere in the Complaint, nor are such facts—even if true—subject to judicial notice. The SE Defendants' attempt to assert facts that are contrary to those alleged in the Complaint is improper on a motion to dismiss. *Lazy Y Ranch Ltd. v. Behrens*, 546 F. 3d 580, 588 (9th Cir. 2008); *Silvas v. E*Trade Mortg. Corp.*, 514 F. 3d 1001, 1003 (9th 2008) ("*Silvas*").

a. The Alleged Participation of the SE Defendants in the CRT Products Conspiracy Is Plausible and Makes Perfect Economic Sense

The SE Defendants concede that under *Twombly*, a complaint need only state a plausible claim for relief in order to survive a motion to dismiss. See SE Defendants' MTD at 8. Purporting to rely on *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("*Matsushita*"), a case involving the evidence needed to withstand *summary judgment*, the SE Defendants contend that the complaint should be dismissed at the pleadings stage because it fails to allege a conspiracy that makes economic sense. This argument is without merit. First, the SE Defendants wrongly claim that the amended complaint alleges a price fixing conspiracy for CRTs (which they did not make), when in actuality, it alleges a conspiracy related to *CRT Products* (which the SE Defendants did make and sell directly to the proposed class). See DP-CAC ¶¶ 1-7, 144, 146, 154-177. The SE Defendants' self-serving attempt to redraft the amended complaint contradicts the requirement that the allegations of the complaint be accepted as true.

Second, contrary to the SE Defendants' claim, the horizontal price fixing allegations asserted in the complaint make perfect economic sense. Here, Samsung is a vertically integrated enterprise that manufactures and sells CRTs *and* the products that incorporate them. DP-CAC ¶¶ 58-67. As alleged in the amended complaint, Samsung

1 colluded with the other Defendants to set supra-competitive prices for CRTs and to mark
 2 up its own CRT Products through its affiliated Samsung manufacturers and distributors
 3 so that the CRT Products bought by direct purchasers incorporated the entire amount of
 4 the conspiratorial overcharge. *Id.* ¶¶ 58-67, 82-86, 134-154, 166-67, 176-77, 191-99.
 5 The SE Defendants nevertheless contend that the conspiracy alleged in the amended
 6 complaint is illogical because the Samsung American subsidiary would not conspire with
 7 its Korean parent corporation to increase the price of CRT components, which would
 8 have decreased the American subsidiary's profit margins.³⁶ Aside from the fact that this
 9 argument improperly challenges the truthfulness of the allegations pled, it also
 10 conveniently ignores that SEC held a substantial ownership interest in the business of
 11 manufacturing/selling CRTs by virtue of its ownership interest in its affiliate, Defendant
 12 Samsung SDI Co. Ltd. ("Samsung SDI"), which, as the SE Defendants concede,
 13 manufactured and sold CRTs during the conspiracy. DP-CAC ¶¶ 58-67.

14 As the amended complaint alleges, the SE Defendants dominated and controlled
 15 the policies and affairs of their co-defendant Samsung SDI Co. Ltd. relating to the
 16 antitrust violations alleged in the complaint. DP-CAC ¶ 61. Under the circumstances, the
 17 SE Defendants' suggestion that they had no economic incentive to participate in a
 18 conspiracy encompassing the CRT component of products which they manufactured
 19 and/or sold is without merit. The manner in which the CRT Products conspiracy
 20 operated so as to account for the vertically integrated structure of some of the Defendant
 21 groups of co-conspirators, like Samsung, is described in detail in the amended complaint.
 22 The complaint first alleges that the object of the conspiracy was to artificially inflate the
 23 prices that Defendants charged their direct customers for CRT Products. DP-CAC ¶¶ 1,
 24 5-6, 134-180, 214-221. The complaint further alleges that to that end, and in furtherance
 25 of the conspiracy, Defendants agreed upon internal transfer prices for CRTs transferred

26
 27 ³⁶ The SE Defendants' argument is itself implausible and makes no economic sense
 28 because if Samsung allowed one of its subsidiaries to undercut the agreed-upon price fix
 by charging less for the CRT Products, then the entire purpose of the conspiracy would
 be defeated and it would have collapsed (which obviously did not occur).

1 between affiliated companies and on external floor prices for CRTs sold by various
 2 Defendant manufacturers of CRTs to Defendants manufacturing/selling products
 3 containing CRTs. DP-CAC ¶ 144. The amended complaint also asserts that Defendants
 4 considered their pricing of CRT products in setting their price levels on CRTs and also
 5 considered “downstream” prices for products containing CRTs when agreeing upon
 6 output restrictions. *Id.* ¶¶ 144, 146. In short, the amended complaint charges that
 7 Defendants agreed to “resolve issues created by asymmetrical vertical integration among
 8 some of the co-conspirators” and to fix target prices and price guidelines for all “CRT
 9 Products” which included both CRTs and products containing CRTs. *Id.* at ¶ 138.
 10 Consequently the conspiracy, as alleged by Plaintiffs, affected prices for *both* CRTs and
 11 products containing CRTs sold in the United States. *Id.* at ¶ 139. The increased prices of
 12 CRTs were not, as the SE Defendants suggest, absorbed by any Samsung company, but
 13 were fully reflected in the prices the SE Defendants (and other Defendants) charged
 14 putative class members.

15 The SE Defendants’ assertion that their participation in a CRT Products
 16 conspiracy is “implausible” also ignores the federal cases most directly on point – those
 17 that analyze price fixing of goods by vertically integrated cartel participants. As noted
 18 above, several cases have addressed situations where Plaintiffs directly purchased
 19 downstream “finished” goods from a cartel of manufacturers who also made and fixed
 20 the price of “upstream” components of those goods. These cases demonstrate that the SE
 21 Defendants’ “implausibility” argument is without merit and contrary to accepted antitrust
 22 principles.³⁷ Contrary to the SE Defendants’ argument, vertically integrated cartel
 23 participants can readily recoup the benefits of price fixing at both levels of the market.
 24 They can take price fixing gains at the upstream level, by overcharging upstream
 25 purchasers and at the downstream level, by overcharging downstream purchasers. Where
 26

27 ³⁷ See *In re Midwest Milk Monopolization Litig.*, 730 F.2d 528, 530, n.2 (8th Cir. 1984);
 28 *Sugar*, 579 F.2d at 16-18; *Linerboard.*, 203 F.R.D. at 216; *Flat Glass*, 191 F.R.D. at 480-
 81; *General Refractories*, 1999 WL 14498.

1 cartel members jointly control an upstream market, they are able to inject supra-
 2 competitive pricing directly into a downstream market in which they also participate. In
 3 short, the conspirators can raise downstream prices by increasing prices of cost inputs.
 4 Indeed to enforce the alleged conspiracy and reap its maximum rewards, it was important
 5 for the Defendant conspirators herein to ensure that their co-conspirators were not
 6 stealing market share in downstream markets by undercutting the CRT Product price
 7 levels set by the cartel. *See* DP-CAC ¶¶ 144, 153, 158, 161-172.

8 In light of the amended complaint's allegations, the participation of the SE
 9 Defendants in the CRT Products price-fixing cartel is logical and makes economic sense.
 10 *See Flat Glass*, 385 F.3d at 358 (“[p]laintiffs’ theory of conspiracy, an agreement among
 11 oligopolists to fix prices at a supracompetitive level, makes perfect economic sense”);
 12 *Chocolate*, 602 F. Supp. 2d at 577 (alleged price fixing agreement “represents an
 13 economically sensible course of action”); *Labelstock*, 566 F. Supp. 2d at 371 (nothing in
 14 *Twombly* compels reversal of determination that the alleged agreement “to fix prices at a
 15 supra- competitive level makes perfect economic sense because the amended complaint
 16 describes market conditions that support an inference that collusive conduct was both
 17 plausible and in [Defendants’] economic interests.”); *Standard Iron Works*, 2009 WL
 18 1657449 at *17 (rejecting argument that alleged conspiracy was implausible because
 19 conspiracy involved both raw steel and “downstream” steel products where defendants
 20 collectively controlled both the components product and the downstream products).³⁸

21 ³⁸ The SE Defendants cite to the indictment of Chen Yuan Lin, which charges criminal
 22 offenses related to color display tubes and color picture tubes, and argue that a price
 23 fixing conspiracy encompassing products containing CRTs is implausible. This argument
 24 is a *non sequitur*. The absence, to date, of criminal charges relating to CRT containing
 25 Products does not in any way negate the existence of such price fixing activity. As a
 26 threshold matter, the government’s criminal investigation of the CRT Products industry is
 27 ongoing. Moreover, the government’s non-prosecution of certain conduct or certain
 28 defendants, to date, is not probative of whether Defendants did or did not commit the
 price fixing acts alleged by Plaintiffs in their amended complaint. *See High Fructose*, 295
 F.3d at 664-65 (“neither can [non-prosecution] be used, as defendants wish to use it in
 this case, to show that because the Justice Department has not moved against the alleged
 HFCS conspiracy, there must not have been one”). *Cf. In re Carbon Black Antitrust Litig.*
 2005 WL 2323184 *1 (D. Mass. Sept. 8 2005) (“[n]eedless to say, the defendants will not
 be permitted to introduce evidence on the merits that the closing of the [DOJ]
 investigation is somehow evidence that no conspiracy exists”). Finally, the government

Moreover, even if, as the SE Defendants allege, they hold only a 20 percent equity stake in Samsung SDI, that is irrelevant since neither Plaintiffs' allegations nor their right to collect damages depends on the precise equity stake the SE Defendants have in one of their corporate affiliates. What matters is that the SE Defendants, along with their Samsung affiliates, are engaged in a common economic enterprise to sell Samsung CRT Products at supra-competitive prices. Indeed, transporting, selling and distributing CRT Products at supra-competitive prices constitutes an overt act of the conspiracy. And this is precisely what the SE Defendants are alleged to have done. DP-CAC ¶¶ 166-167. As made clear in *Royal Printing* and *Freeman*, where there is "no realistic possibility" that the SE Defendants will bring a Sherman Act claim against one of their Samsung corporate affiliates for price-fixing, those who purchased from the SE Defendants are considered direct purchasers, and may proceed with damages claims under the Sherman Act. *See Freeman*, 322 F. 3d at 1145-46; *Royal Printing*, 621 F. 2d at 326.

In sum, the amended complaint alleges direct evidence of a conspiracy to fix the prices of CRT Products. Accordingly, there is no merit to the SE Defendants' claim that Plaintiffs have failed to assert sufficient facts to state a plausible grounds for relief.

b. The Amended Complaint Adequately Alleges the SE Defendants' Participation in the Price-Fixing Conspiracy

As noted above, the law does not require a detailed defendant-by-defendant account of participation in the claimed conspiracy. Here, the complaint does not presume the SE Defendants' participation in the alleged antitrust conspiracy in the CRT Products market, it alleges specific and detailed facts that show the SE Defendants directly participated in the alleged conspiracy. *See DP-CAC* ¶¶ 3-7, 58-66, 144, 146, 54-77.

The amended complaint also states that SEC in particular "participated in

has limited prosecutorial resources requiring selective allocation of those resources among many provable criminal matters that come to its attention. As a result, the government is unable to criminally prosecute every provable charge and may drop or bargain away criminal charges or portions thereof in the ordinary course, depending upon its deterrence and other goals and the array of potential criminal cases under review. *See Vitamins.*, 2000 WL 1475705 at *11.

1 hundreds of illegal bilateral and illegal group meetings from 1995 through at least 2006
 2 in which unlawful agreements as to, *inter alia*, price output restrictions, and customer and
 3 market allocation of CRT Products occurred. *Id.* ¶ 166. The amended complaint states
 4 that Samsung Electronics America, Inc. ("SEAI") was "represented at those meetings and
 5 [was] a party to the agreements entered at them" and that SEAI "played a significant role
 6 in the conspiracy because Defendants wished to ensure that the prices for such products
 7 paid by direct purchasers would not undercut the pricing agreements reached at these
 8 various meetings." *Id.* ¶ 167. Thus, Samsung Electronics Co., Ltd. ("SEC") and SEAI
 9 were both active, knowing participants in the conspiracy.

10 Plaintiffs' allegations against all Defendants, together with allegations specific to
 11 the SE Defendants, are more than sufficient to establish Plaintiffs' claims.

12 **c. The SE Defendants' Liability Is Based On Their *Own***
 13 **Unlawful Conduct and Participation in the Conspiracy,**
 14 **and Not Vicarious Liability, As They Erroneously Claim**

15 The SE Defendants argue that they cannot be held vicariously liable for the acts of
 16 Samsung SDI. This argument ignores the averments of the amended complaint. The
 17 amended complaint specifically alleges that SEC participated in numerous collusive
 18 meetings, a fact which the SE Defendants completely ignore. DP-CAC ¶166. Thus, it is
 19 being sued for its own misconduct, not on any theory of vicarious liability. The complaint
 20 further states that SEAI, among others, was represented at those meetings by other
 21 Samsung companies. *Id.* ¶167. This is consistent with paragraph 154 of the DP-CAC:

22 When Plaintiffs refer to a corporate family or companies by
 23 a single name in their allegations of participation in the
 24 conspiracy, it is to be understood that the Plaintiffs are
 25 alleging that one or more employees or agents of entities
 26 within the corporate family engaged in conspiratorial
 27 meetings on behalf of every company in that family. In
 28 fact, the individual participants in the conspiratorial
 meetings and discussions did not always know the
 corporate affiliation of their counterparts, nor did they
 distinguish between the entities within a corporate family.
 The individual participants entered into agreements on
 behalf of, and reported these meetings and discussions to,

their respective corporate families. As a result, the entire corporate family was represented in meetings and discussions by their agents and was party to the agreements reached in them. For the various meeting participants identified below, in many instances, their high-ranking executives participated in a significant number of the meetings described.

Thus, the amended complaint sets forth averments that Samsung SDI acted as the agent of SEAI at the various Glass meetings described therein. Judge Illston in *TFT-LCD II* found such allegations sufficient to plead agency. 599 F.Supp.2d at 1185.³⁹

Such a determination is also supported by the practicalities of Samsung's overall structure. Samsung SDI is part of what Samsung itself calls the "Samsung Group."

http://www.samsung.com/hk_en/aboutsamsung/samsunggroup/affiliatedcompanies/SAMSUNGGroup_AffiliatedCompanies.html. The companies within this group are closely interrelated and operate interactively. Indeed, Samsung's own website goes on to state:

SAMSUNG electronics subsidiaries include SAMSUNG Electronics, SAMSUNG Electro-Mechanics, SAMSUNG SDI, SAMSUNG Corning, SAMSUNG SDS, SAMSUNG Networks and SAMSUNG Corning Precision Glass. These affiliates produce, market, and sell a wide variety of electronic parts and components such as next generation memory chips, computer and telecommunications equipment, color TV picture tubes, and glass bulbs. They also develop computer systems and produce general electronics and precision machines.

All these companies share the same goal of becoming world-class, high-tech companies at the beginning of the 21st century and are concentrating their investments into promising future fields to achieve that target. Despite being independent, systematic cooperation takes place between the companies that enable the development of state-of-the-art electronic products.

³⁹ See, also *Gilbert v. Concentra Health Servs., Inc.*, No. 03:07-CV-00264-LRH-VPC, 2008 WL 318356 at *2 (D. Nev. Jan. 31, 2008) ("[b]ecause the specific facts will be revealed through discovery, it is not necessary for Plaintiff's amended Complaint to set forth detailed allegations of agency. Arguments as to whether the evidence supports the allegations are more appropriately considered in a motion for summary judgment"); *Dion LLC v. Infotek Wireless, Inc.*, No. C 07-1431 SBA, 2007 WL 3231738, at *4 (N.D. Cal., Oct. 30, 2007) (rejecting defendant's argument that a plaintiff asserting a claim based on agency relationship must plead the elements of agency; plaintiff need only place the defendant on notice that its claim is based on an agency theory).

1 http://www.samsung.com/hk_en/aboutsamsung/samsunggroup/affiliatedcompanies/SAM
 2 [SUNGGroup_ElectronicIndustries.html](http://www.samsung.com/hk_en/aboutsamsung/samsunggroup/affiliatedcompanies/SAM).

3 This was equally true in earlier years. As one scholar noted in 2003:

4 Samsung Electronics is closely interlinked with Samsung
 5 SDI, a manufacturer of television tubes, which in turn relies
 6 on Samsung Corning, which produces glass bulbs for the
 7 tubes, as indicated by the fact that 61% of its total revenue
 8 comes from Samsung SDI. Samsung SDI, in turn, supplies
 9 52% of its products to Samsung Electronics.

10 Sea-Jin Chang, *Financial Crisis And Transformation of Korean Business Groups* at 118-
 11 20 (Cambridge University Press, 2003).

12 As discussed above, the complaint alleges specific and detailed facts that show
 13 the SE Defendants colluded with their co-conspirators to reap supra-competitive prices
 14 for CRT Products they assembled and sold to direct purchasers in the United States.
 15 Thus, the basis of the SE Defendants' inclusion in the Complaint is predicated on their
 16 own illegal conduct, and not on a theory of vicarious liability as they incorrectly contend.

17 **d. The Amended Complaint Satisfies the Requirements of**
 18 ***Twombly* and Rule 8**

19 Relying on *Kendall*, the SE Defendants next assert that to satisfy Rule 8, a
 20 complaint must allege (before any discovery has occurred) the specific "who, what,
 21 where" of the alleged conspiratorial agreement. Before addressing the SE Defendants'
 22 erroneous interpretation of *Kendall*, it is important to note why that case is readily
 23 distinguishable from the amended complaint at issue here. The Ninth Circuit's decision
 24 in *Kendall* addressed a complaint that was patently deficient, both before and after
 25 *Twombly*. In *Kendall*, the plaintiffs alleged a conspiracy based solely on the facts that
 26 certain banks who issued VISA and MasterCard credit cards also had a "proprietary
 27 interest" in the VISA and MasterCard "consortiums," and that the consortiums set
 28 interchange fees which they charged to the banks, which were then ultimately passed on
 to merchants. 518 F.3d at 1045-46. The plaintiffs merely alleged, in conclusory fashion,

1 that the banks conspired through and with the consortiums to which they belonged. *Id.* at
2 1048. Not surprisingly, the Ninth Circuit held that bare allegations of ownership and
3 control of the consortiums that set the fees did not state a Section One claim. *Id.* at 1048-
4 49 (plaintiffs "simply allege the consortiums are coconspirators, without providing any
5 facts to support such an allegation, despite having deposed executives from both
6 MasterCard and Visa"). Notably absent was any allegation that the banks agreed to abide
7 by or charge the fees set by the consortiums. Without more, the plaintiffs had failed to
8 allege even a basic agreement. The court also found it significant that the plaintiffs had
9 deposed executives of the consortiums prior to filing an amended complaint.

10 In contrast to *Kendall*, the amended complaint in the instant case contains specific
11 and detailed facts concerning the existence of a classic agreement among horizontal
12 conspirators to fix prices and restrict output. The amended complaint asserts numerous
13 allegations of unusual price movements, agreements to restrict output in order to inflate
14 prices, customer and market allocation of CRT Products, exchanges of sensitive
15 proprietary and competitive information through secret meetings and trade associations,
16 and governmental investigations. These are *per se* antitrust violations, as opposed to the
17 bare assertion of a conspiracy that formed the basis of the complaint in *Kendall*.

18 In short, neither Rule 8 nor *Twombly* require Plaintiffs to do the impossible: plead
19 the complaint as if they were actual observers of the conspiracy, or were present in every
20 room in which the Defendants met to formulate and carry out their unlawful price-fixing
21 agreements. Rather, as the Supreme Court held in *Twombly*, in order to state a Section
22 One claim, a complaint must contain sufficient factual allegations "to raise a right to
23 relief above the speculative level." *Twombly*, 550 U.S. at 555. The Court further
24 explained that "such a claim requires a complaint with enough factual matter (taken as
25 true) to *suggest* that an agreement was made. Asking for plausible grounds to *infer* an
26 agreement does not impose a probability requirement at the pleading stage; it simply calls
27 for enough fact to raise a reasonable expectation that discovery will reveal evidence of
28 illegal agreement." *Id.* at 556 (emphasis added). Here, Plaintiffs' detailed amended

1 complaint more than satisfies the threshold articulated in *Twombly*.

2 3. Tatung America

3 Tatung Company of America, Inc.'s ("Tatung America") motion ("TA Mot.")
4 should also be denied. The motion rests on two grounds: 1) that Plaintiffs have not
5 sufficiently alleged Tatung America's participation in the conspiracy; and 2) that it
6 should be regarded as a direct purchaser of the price-fixed products rather than a member
7 of the conspiracy. Both lack merit.

8 First, like many of the other Defendants, Tatung America's motion is based on a
9 fundamental misreading of Plaintiffs' allegations. The alleged conspiracy is not limited
10 to CRTs, but also extends to products containing CRTs – CRT Products – manufactured
11 and/or sold by Defendants, including Tatung America. The amended complaint more
12 than adequately details Tatung America's role in the cartel: the company distributed and
13 sold Defendants' CRT Products, including its corporate affiliate Chunghwa PT's CRT
14 Products, in the United States at supracompetitive prices. DP-CAC ¶¶ 24, 69, 169.

15 Second, Tatung America's jurisdictional motion to dismiss under Rule 12(b)(1)
16 also fails. Apart from the fact that it is alleged to be a member of the conspiracy in its
17 own right, the evidence submitted by Tatung America fails to show that it is not affiliated
18 with Chungwha PT. To the contrary, there can be little doubt that the two companies
19 are closely related. Both are subsidiaries of Tatung Company ("Tatung Taiwan"), both
20 are dominated and controlled by Tatung Taiwan, and together they operate to
21 manufacture, sell, and distribute CRTs and CRT Products in the United States and
22 throughout the world. Indeed, Judge Illston has already so ruled on a virtually identical
23 motion to dismiss filed by Tatung America in the *LCD* case, which Tatung America fails
24 to cite. *TFT-LCD III*, 2009 WL 533130 * 1-2.

25 a. Tatung America Participated in the CRT Product Price- 26 Fixing Conspiracy

27 In more than sufficient detail, the amended complaint alleges that, beginning in
28 March 1995 at the latest, the CRT Product cartel was organized; Tatung America,

1 its sister company Chunghwa PT, and the other Defendants agreed to join; and, as a
 2 result, the prices of CRT Products sold to customers, including customers in the United
 3 States were raised, fixed, and stabilized. *See e.g.*, DP-CAC ¶¶ 1, 5, 6, 24, 25, 69, 134.⁴⁰

4 The aim of the conspiracy was to inflate and maintain prices of both CRT panels
 5 as well as the full range of CRT Products that Defendants manufactured or sold in the
 6 United States and throughout the world, either by themselves or through affiliates and
 7 entities within their vertically integrated enterprises. *Id.* Defendants made these
 8 anticompetitive agreements to enrich themselves, not only by imposing higher prices than
 9 would exist in a competitive market, but also by taking steps to prevent competition in
 10 the downstream CRT product markets in the United States from undercutting their
 11 agreements on the prices and supply of CRT panels. As the amended complaint explains
 12 at various points, to the extent that corporate families distributed CRT Products to direct
 13 purchasers, these subsidiaries played a significant role in the conspiracy because
 14 Defendants wished to ensure that prices for such products paid by the direct purchasers
 15 would not undercut the pricing agreements reached at the[] various meetings. *See e.g.*,
 16 ¶¶144,169; *see also id.* at ¶ 84 (“Each Defendant that is a subsidiary of a foreign parent
 17 acts as the United States agent for CRTs and CRT Products made by its parent
 18 company.”).

19 The allegations against Chunghwa PT and Tatung America are consistent with
 20 this pattern and describe a vertically integrated corporate family. Both are alleged to be
 21 subsidiaries of Tatung Taiwan. *Id.* at 24 (Chunghwa PT “established in 1971 by Tatung
 22 Corporation”), 69. Both are alleged to be members of the conspiracy in their own right.

23
 24 ⁴⁰ Plaintiffs also allege that on February 10, 2009, a Chunghwa PT executive was indicted
 25 for participating in a conspiracy to fix the prices of CRTs sold in the United States. *Id.* at
 26 ¶¶ 7, 124-126. *See Saveri Decl.*, ¶ 9 (Exh. 7 (February 10, 2009 indictment of C.Y. Lin,
 27 Case No. 3-09-cr-00131-WHA (N.D. Cal.))). An indictment, the facts stated therein, and
 28 the fact that a federal indictment usually leads to a guilty plea, are the proper subjects of
 judicial notice. *See United States v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999)
 (indictment contains “judicially noticeable facts”); *Cortez v. U.S.*, 337 F.2d 699, 701 (9th
 Cir. 1964) (“[w]e take judicial notice of the fact that the vast majority of those who are
 indicted for federal crimes plead guilty.”).

1 See e.g., *id.* at 154, 155. Chunghwa PT is alleged to be a CRT manufacturer; Tatung
 2 America is alleged to have “manufactured, marketed, sold and/or distributed” products
 3 containing Chunghwa PT CRTs. See *id.* at 24, 69, 169. Chunghwa PT attended over five
 4 hundred conspiratorial meetings, and Plaintiffs’ specifically allege that “the entire
 5 corporate family” – i.e., including Tatung America – was represented in the
 6 conspiratorial meetings. *Id.* at 154, 155.⁴¹ Contrary to its assertions, moreover, Tatung
 7 America’s membership and role in the conspiracy is specifically alleged: “To the extent
 8 Tatung America distributed CRT Products to direct purchasers, it played a significant
 9 role in the conspiracy because Defendants wished to ensure that the prices for such
 10 products paid by direct purchasers would not undercut the pricing agreements reached at
 11 these various meetings. Thus, Tatung America was an active, knowing participant in the
 12 alleged conspiracy.” *Id.* ¶ 169.

13 These allegations are plainly sufficient to state a claim against Tatung America.
 14 As explained above, Tatung America’s contention that the law requires more detail of
 15 their participation in the conspiracy is incorrect. These allegations are amply sufficient to
 16 put it on fair notice of Plaintiffs’ claims. Tatung America’s lengthy discussion of alter
 17 ego theory is also not pertinent. As the foregoing makes clear, Tatung America’s liability
 18 does not depend on Plaintiffs’ ability to “pierce the corporate veil.” It is alleged to be a
 19 member of the conspiracy in its own right.⁴²

20 ⁴¹ The fact that Tatung Taiwan, unlike some other Defendant parent companies herein, is
 21 not a named Defendant, therefore, is not relevant.

22 ⁴² Moreover, for purposes of the United States antitrust laws, corporate affiliates are
 23 treated as a single entity or unit. The Supreme Court held in *Copperweld Corp. v.*
 24 *Independence Tube Corp.*, 467 U.S. 752 (1984) (“*Copperweld*”), that entities within a
 25 corporate family cannot be held to have conspired with one another. *Id.* at 769, 771. A
 26 corollary to this rule is that such entities are treated as a single unit when specific
 27 conspirators are identified. As the Ninth Circuit concluded, “[w]here there is substantial
 28 common ownership, a fiduciary obligation to act for another entity’s economic benefit or
 an agreement to divide profits and losses, individual firms function as an economic unit
 and are generally treated as a single entity” under the Sherman Act. *Freeman*, 322 F.3d
 at 1147-48. Tellingly, four of the six cases that Tatung America cites as requiring a veil-
 piercing analysis of Plaintiffs’ allegations are not antitrust cases and are thus not on point.
 Of the two antitrust cases, one—*Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429,
 454-56 (9th Cir. 1979)—predates *Copperweld* and relies on a contractual analysis that is
 defective after *Copperweld*. The other case—*Invamed, Inc. v. Barr Labs., Inc.*, 22 F.

b. Tatung America Is Not a Direct Purchaser of CRT Products Under *Illinois Brick* and *Royal Printing*

Tatung America argues that its customers are not members of the Direct Purchaser Class, according to the Supreme Court's holding in *Illinois Brick*. Based on *Illinois Brick*, Tatung America claims to be a direct purchaser and, therefore, a member of the class and not a proper defendant. On this basis, Tatung America moves to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1).⁴³

This argument makes little sense. First, as explained above, Tatung America is alleged to be a member of the conspiracy in its own right and the alleged conspiracy extends to CRT Products sold by it to class members.

Second, the law is clear that transactions between corporate affiliates do not, under *Illinois Brick*, insulate them from federal antitrust liability. As noted, Judge Illston has already rejected a motion from Tatung America based on virtually identical arguments and evidence. The evidence is equally clear here that Tatung Taiwan, Chunghwa, and Tatung America are part of the same corporate family and are under common ownership and control. *Illinois Brick* provides Tatung America no protection.

It is well-established under *Illinois Brick* that a purchaser from a corporate affiliate of a conspirator is entitled to bring a damages action under the federal antitrust laws. See *Freeman*, 322 F.3d at 1145-46; *Royal Printing*, 621 F.2d at 326. Ignoring this well-established doctrine for a second time, Tatung America misconceives the basic tenets of *Illinois Brick*. The point of *Illinois Brick* was to enable and encourage private antitrust enforcement, not to discourage it. See *Illinois Brick*, 431 U.S. at 735 ("the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially

Supp. 2d 210, 222 (S.D.N.Y. 1998)—predates the Ninth Circuit's decision in *Freeman* and does not consider either the impact of *Copperweld* on substantive antitrust law or the implications of economic unity of interest among defendants.

⁴³ As a procedural matter, Tatung America's motion is not proper under Rule 12(b)(1). The Court has subject matter jurisdiction over federal statutory claims under the Sherman Act, 15 U.S.C. § 15(a); 28 U.S.C. § 1331.

1 affected by the overcharge to sue only for the amount it could show was absorbed by
 2 it.”). *Illinois Brick* accomplished this purpose by locating the right to assert Sherman Act
 3 damage claims in the entities or persons most likely to assert such claims: direct
 4 purchasers. Direct purchasers, by definition, are third parties that conduct business with
 5 cartel members or co-conspirators through arm’s length transactions. *Illinois Brick* limits
 6 federal antitrust claims further down the distribution chain, not because a particular
 7 defendant did not damage indirect purchasers, but rather “because the defendants *did* sell
 8 to a third party who (after *Hanover Shoe*) could recover for any injury they claimed.”
 9 *Loeb Indus. v. Sumitomo Corp.*, 306 F.3d 469, 482 (7th Cir. 2001).

10 *Royal Printing* makes clear that *Illinois Brick* was not intended to allow cartel
 11 members to foreclose damage claims by the artifice of a sale to a related party. *Royal*
 12 *Printing*, 621 F.2d at 326. To rule otherwise would substantially impair antitrust
 13 enforcement, because in such situations there is “no realistic possibility” that the related
 14 party will bring a Sherman Act damages claim. *Id.*, see also *Freeman*, 322 F.3d at 1145-
 15 46 (“ . . . [I]ndirect purchasers can sue for damages if there is no realistic possibility that
 16 the direct purchaser will sue its supplier over the antitrust violation.”)

17 As noted, Tatung America brought an indistinguishable motion in the *TFT-LCD*
 18 price-fixing litigation. As here, the defendants in that case include Tatung America and
 19 Chunghwa PT. Relying on the same arguments and factual averments put forward here,
 20 Tatung America moved to dismiss under Rules 12(b)(1) and 12(b)(6). Judge Illston
 21 denied the motion:

22 The Court finds that the amended complaint sufficiently
 23 alleges a basis for TUS’s [Tatung America’s] liability. The
 24 factual record is disputed as to the relationship between
 25 TUS, CPT, and Tatung Taiwan, as well whether TUS’s
 26 purchases of LCDs and finished products containing LCDs
 27 was truly arms-length or in furtherance of the alleged
 conspiracy. On this record, TUS has not shown that it is
 not a proper defendant under *Royal Printing* and *Freeman*.
 Upon a fuller factual record, TUS may renew its arguments
 in a motion for summary judgment.

28 *TFT-LCD III*, 2009 WL 533130, at *2; see also, *id.* (evidence “showing that Tatung

1 Taiwan owns and controls both TUS and CPT and that the three firms have intertwined
 2 economic interests; that TUS has described itself as a subsidiary of Tatung Taiwan . . .
 3 and TUS has never sued Tatung Taiwan or CPT.”)

4 Tatung America’s claim that it is an arm’s length purchaser from Chunghwa PT
 5 remains baseless. Limited discovery in the *TFT-LCD* litigation demonstrates that
 6 Chunghwa PT is a close corporate affiliate of Tatung America and Tatung Taiwan, that
 7 the three entities collectively operate in vertically integrated fashion to manufacture, sell,
 8 and distribute CRTs and CRT Products in the United States, and that the three entities
 9 have intertwined economic interests. There is no realistic possibility that Tatung
 10 America will sue Chunghwa PT or any other entity within the Tatung corporate family or
 11 any member of the conspiracy.

12 Tatung America is entirely owned by Tatung Taiwan and the family that controls
 13 Tatung Taiwan. Tatung Taiwan owns 50%; the former chairwoman of Tatung America,
 14 Lun Kuan Lin, owned 46 percent at her death in 2007; prior to her death, her son and
 15 daughter each held a 2 percent interest. Upon her death, Ms. Lin bequeathed her 46
 16 percent interest in Tatung America to her children. Saveri Decl., ¶¶ 7, 8; Exh. 6
 17 (Declaration of Jordan Elias (hereinafter “Elias Decl.”)), ¶ 8, exh. G, at 7-9, 27-28
 18 [Deposition of Michael Lai].

19 Five of Tatung America’s six directors are members of the Lin family or are
 20 employees of Tatung Taiwan. *Id.* at ¶¶ 6, 8; Exh. G, at 6, 19-24 [Lai]; Exh. E, at 75-77
 21 [Deposition of Edward Chen]. Put another way, Tatung America’s board consists of
 22 Tatung Taiwan’s chairman, his two sisters, his nephew, a Tatung Taiwan employee, and
 23 a former Tatung Taiwan employee. *Id.*

24 Similarly, Chunghwa PT is owned by Tatung Taiwan. Tatung America represents
 25 to potential customers that “Tatung owns Chunghwa Picture Tube (CPT).” *Id.* at ¶ 9;
 26 Exh. H, at TUSP0026399. Edward Chen, the executive vice president in charge of
 27 Tatung America’s commercial division, testified: “I think Tatung Group, Tatung
 28 headquarter[s], does own the CPT.” *Id.* at ¶ 6; Exh. E, at 47 [Chen].

Neither of the two Tatung America executives who gave deposition testimony could identify any instance when Tatung America sued Tatung Taiwan or Chunghwa. *Id.* at ¶¶ 6, 8; Exh. G, at 27 [Lai]; Exh. E, at 82-83 [Chen]. Tatung America, Tatung Taiwan, and Chunghwa have been sued on multiple occasions for their collective participation in agreements and transactions involving the sale of TFT-LCD panels and products, including the *LG v. Tatung* patent litigation brought against Tatung Taiwan and its affiliated entities, including Tatung America. *See id.* at ¶ 7; Exh. F.

Finally, Tatung America admits that it and Chunghwa PT are part of a vertically integrated enterprise. Tatung America holds itself out to the public as a subsidiary of Tatung Taiwan, telling potential customers that “Tatung Company of America, Inc. is *the subsidiary* of Tatung Company based in Taiwan.” *Id.* at ¶¶ 2, 3; Exh. A, at TUSP009432; Exh. B, at TUSP0009430 (emphasis added)); *see also id.* at ¶¶ 4-6, Exh. C, at TUSP0009356; Exh. D, at TUSP0009379; Exh. E, at 60-66 [Chen]. Tatung America identifies Tatung Taiwan’s customers as its own. Specifically, Tatung America stated that it sold products to Hitachi, NEC, and Apple, among other firms, when in reality these firms were customers of Tatung Taiwan and never bought anything from Tatung America. *Id.* at ¶ 6; Exh. E, at 22-29); *see id.* at ¶¶ 5, 12; Exh. D, at TUSP0009379; Exh. K, at TUSP0024290. Tatung America and Tatung Taiwan confirmed that they are a single corporate entity in a Rule 7.1 corporate disclosure statement filed on September 2, 2005, in the patent suit brought by LG. Philips LCD Co., Ltd. (“LG”) against Tatung Group in the federal court for the District of Delaware. *Id.* at ¶ 7; Exh. F.⁴⁴ Likewise, Tatung America confirmed that Chunghwa PT is “*our own*

⁴⁴ Tatung America is estopped from asserting the contrary. *See Johnson Service Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 174 (5th Cir. 1973) (at common law “a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertion sought to be made. . . . [I]t is not necessary that the party invoking this doctrine have been a party to the former proceeding”); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001) (“[t]he application of judicial estoppel is not limited to bar the assertion of inconsistent positions in the same litigation, but is also appropriate to bar litigants from making incompatible statements in two different cases.”); *United Virginia Bank/Seaboard Nat. v. B.F. Saul Real Estate Inv. Trust*, 641 F.2d 185, 190 (4th Cir. 1981) (under judicial estoppel doctrine, “courts have prohibited litigants from ‘playing

1 *sister company*” and an “affiliates [sic] company.” *Id.* at ¶¶ 10, 5; Exh. I, at
 2 TUSP0002458 (emphasis added); Exh. D, at TUSP0009381). Together with Chunghwa
 3 PT, Tatung America is an important part of Tatung’s “well-established vertical
 4 integration” and Chunghwa PT is its “primary” supplier. *Id.* at ¶ 12; Exh. K, at
 5 TUSP0024266, TUSP0024282; ¶¶ 4, 5; Exh. C, at TUSP0009356; Exh. D, at
 6 TUSP0009381).

7 The evidence before the court makes it clear that Tatung America and Chunghwa
 8 PT are corporate affiliates. Both are owned by the same entity, Tatung Taiwan. Tatung
 9 Taiwan and the Lin family together own 100 percent of Tatung America. Every single
 10 director of Tatung America has a connection with Tatung Taiwan or with the Lin family,
 11 the family that controls the business operations of Tatung Taiwan, Tatung America, and
 12 Chunghwa. Tatung America and Tatung Taiwan confirmed that they are a single
 13 corporate entity in a Rule 7.1 corporate disclosure statement filed in federal court.
 14 Similarly, Tatung America holds itself out as being fully integrated with the Tatung
 15 corporate family, including both Chunghwa and Tatung Taiwan. Given these facts,
 16 there is no realistic possibility that Tatung America will ever sue Tatung Taiwan or
 17 Chunghwa PT over antitrust violations. Therefore, as Judge Illston previously held on
 18 these facts, the corporate affiliate exception to *Illinois Brick* preserves the Court’s
 19 jurisdiction. *TFT-LCD III*, 2009 WL 533130 at *2.

20 The two declarations on which Tatung America relies cannot alter this conclusion.
 21 They are *silent* about the source of any CRT Products that Tatung America is
 22 “purchasing,” and allow for that fact that Tatung America “purchases” CRT Products
 23 from Chunghwa PT and other members of the conspiracy or their agents. Simply
 24 because transfers of products to Tatung America are styled as “purchases” does not
 25 convert those transactions into arm’s length sales. Nor does it transform Tatung America

26 fast and loose,’ *Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953), or ‘blow[ing]
 27 hot and cold,’ *Ronson Corp. v. Liquifin Aktiengesellschaft*, 375 F. Supp. 628, 630
 28 (S.D.N.Y. 1974), by barring them from taking inconsistent positions during the course of
 litigation.”).

1 into an entity independent of indicted cartel member Chunghwa PT or their mutual
2 parent, Tatung Taiwan.

3 Mr. Lai quibbles that “[c]urrently” Tatung Taiwan owns “only approximately
4 30%” of Chunghwa and has “never” owned 100% of Chunghwa. Lai Decl. ¶ 2. So
5 what? The amended complaint does not assert that that Chunghwa PT is a *wholly-owned*
6 subsidiary of Tatung Taiwan—and neither Plaintiffs’ allegations, nor their right to collect
7 damages, depend on such a fact.⁴⁵

8 In sum, Tatung America’s arguments pursuant to Rule 12(b)(1) should be
9 rejected, in light of Judge Illston’s ruling, the evidence submitted with this opposition,
10 and the inadequacy of the declarations on which Tatung America relies. However, to the
11 extent that the Court finds here that the declarations raise factual issues, Plaintiffs request
12 the Court allow them to take discovery necessary to respond to Tatung America’s motion
13 and supplement their response. “[D]iscovery should ordinarily be granted where
14 pertinent facts bearing on the question of jurisdiction are controverted or where a more
15 satisfactory showing of the facts is necessary.” *Laub v. U.S. Dep’t of Interior*, 342 F.3d
16 1080, 1093 (9th Cir. 2003) (quoting *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*,
17 788 F.2d 535, 540 (9th Cir. 1986)).

18 4. Toshiba

19
20 Despite the comprehensive allegations of the amended complaint, the Toshiba and
21 various related entities (“Toshiba”) argue that, as compared to the other Defendants, the
22 pleading requirements of Rule 8 have not been met as to them. “Toshiba Entities’

23
24 ⁴⁵ Tatung America’s argument, even if correct, would not affect its joint and several
25 liability as a co-conspirator for all acts of the conspiracy. Co-conspirators in price-fixing
26 actions, such as Tatung America here, are fully liable if they have sold price-fixed
27 products through distributors who are also co-conspirators. *See Paper Sys. Inc. v. Nippon*
28 *Paper Indus.*, 281 F.3d 629, 631-32 (7th Cir. 2002); *Lowell v. American Cyanamid Co.*,
177 F.3d 1228, 1230-31 (11th Cir. 1999); *In re Brand Name Prescription Drugs*, 123
F.3d 599, 604-05 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998) (“BNPD”); *Arizona*
v. Shamrock Foods Co., 729 F.2d 1208, 1211 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197
(1985).

1 Motions To Dismiss (1) The Direct Purchaser Plaintiffs' Consolidated Amended
 2 Complaint And (2) The Indirect Purchaser Plaintiffs' Consolidated Amended
 3 Complaint," p. 1 (May 18, 2009) ("Toshiba Mot."). Specifically, Toshiba seeks to
 4 distinguish themselves on the grounds that: (1) no Toshiba entity has been the subject of
 5 a criminal investigation or a criminal case regarding CRT Products (or products in other
 6 electronics industries) (*id.* at 2-5); (2) Toshiba did not have as significant market share as
 7 other Defendants (*id.* at 5-6); (3) the DP-CAC does not provide specific examples of
 8 price increases or production decreases by Toshiba (*id.* at 6-7); and (4) the DP-CAC does
 9 not include allegations of Toshiba's participation in trade associations or shows (*id.* at 7).
 10 Toshiba also contends that the DP-CAC does not include sufficiently detailed allegations
 11 about the role played by each Toshiba entity in the alleged conspiracy (*id.* at 8-18).⁴⁶

12 To make such arguments, however, Toshiba ignores basic legal standards (*e.g.*,
 13 reading the complaint as a whole and in Plaintiffs' favor, and recognizing the role that
 14 circumstantial evidence can play in proving a conspiracy), and misunderstands the
 15 threshold showing that Plaintiffs must make at the pleading stage, as compared to
 16 summary judgment or trial. Plaintiffs now need only make allegations that plausibly
 17 suggest that a conspiratorial agreement was made, or that raise a reasonable expectation
 18 that discovery will reveal evidence of illegal agreement. The DP-CAC does this,
 19 including as to Toshiba, because the most essential aspects of the alleged conspiracy have
 20 been sufficiently alleged – *i.e.*, an economically plausible conspiracy to fix prices, reduce
 21 production, and allocate market share among major manufacturers of CRT Products that:
 22 (1) was carried out through a long-standing practice of meetings, primarily "Glass
 23 Meetings," which are thoroughly described in the DP-CAC; and, (2) is corroborated by
 24 the indictment of Defendant Chunghwa PT's former Chairman and CEO, C.Y. Lin.

25
 26 ⁴⁶ The Toshiba entities also make an argument based on their having exited the
 27 CRT industry in 2002, but those arguments are essentially duplicative of their argument
 28 about why such an exit should be deemed a withdrawal from the conspiracy. *Cf.* Toshiba
 Mot. at 7-8 with 18-20. That argument is separately addressed below.

None of the specific factors that Toshiba points to as supposed shortcomings are required at the pleading stage. To the extent such factors are alleged with respect to other Defendants (*e.g.*, a Defendant being indicted), such factors provide further support for the existence of the alleged conspiracy, but their absence as to Toshiba does not provide grounds for dismissal. This last point is particularly significant with respect to Toshiba's arguments that the DP-CAC does not include sufficiently detailed allegations about the role played by each Toshiba entity in the alleged conspiracy. As evident in cases applying *Twombly*, once a conspiracy has been sufficiently alleged, the primary purpose of further alleging each Defendant's involvement is simply to "put defendants on notice of the claims against them." *TFT-LCD II*, 599 F. Supp. 2d at 1184. When, as here, the conspiracy is otherwise sufficiently alleged, details (*e.g.*, describing overt acts by each specific Defendant) are unnecessary to satisfy the notice requirement. *Id.* Here, there is "a reasonable expectation that discovery will reveal evidence of" Toshiba's entering the illegal agreement. Toshiba has been sufficiently apprised of the allegations against it. The DP-CAC should be upheld as against those entities.

Finally, Toshiba's arguments about withdrawal are misplaced. Even the authorities cited acknowledge that an effective withdrawal at least requires a complete severance of all benefits flowing from the alleged conspiracy. Moreover, the issue of withdrawal is a disputed matter not to be resolved by a motion to dismiss. Here, because Toshiba retained a significant interest in the CRT business through their joint venture with Matsushita at least until 2007 (and because the pleadings do not, as Toshiba suggests, reveal that it exited *all* aspects of the CRT Products business (*e.g.*, manufacturing televisions and computer monitors) in 2002) granting a motion to dismiss on this ground is not warranted.

a. Toshiba Is Wrong In Claiming That Plaintiffs' Allegations Against Them Differ Materially From The Allegations Against Other Defendants.

Toshiba claims that there are "nine key areas" in which the DP-CAC differs as to

1 it and then goes on to argue that there is a lack of specific allegations showing how each
 2 Toshiba entity was involved in the alleged conspiracy. Toshiba Mot. at 1, 8-9. These
 3 claims actually amount to only four challenges to the sufficiency of Plaintiffs' allegations
 4 against the Toshiba entities, and none of those four challenges withstand scrutiny.

5
 6 i. **Allegations Regarding Criminal Investigations
 7 and Cases Against Other Defendants Support
 8 The Plausibility of The Alleged Conspiracy, But
 9 Such Allegations Need Not Be Made Against
 10 Each Defendant**

11 The first "four" areas of the DP-CAC upon which the Toshiba entities seek to
 12 distinguish themselves are actually only one area, lack of governmental action. That is,
 13 Toshiba says that it should be dismissed because its component entities have not been
 14 indicted, put under U.S. Department of Justice or foreign criminal investigation, or plead
 15 guilty in a kindred product area.⁴⁷ But the absence of such an allegation is hardly fatal to
 16 the sufficiency of the DP-CAC against Toshiba.

17 Although the DP-CAC does not allege that Toshiba was the subject of a criminal
 18 case or investigation, Plaintiffs' core allegations against it remain, most significantly:
 19 (1) detailing the hundreds of meetings, including "Glass Meetings," held over a twelve-
 20 year period during which Toshiba participated at least 50 times over a seven-year period
 21 (DP-CAC ¶¶ 134-153, 171); and (2) corroborating the existence of such meetings and
 22 conspiracy related to CRT Products, as evidenced by the indictment of Chunghwa PT's
 23 former Chairman and CEO C.Y. Lin (DP-CAC ¶ 126).

24 In short, the absence of an allegation of criminal enforcement agencies having
 25 initiated (or succeeded) in bringing a criminal matter against Toshiba does not serve as an
 26 irrefutable badge of innocence. Toshiba misses the fundamental point – which is that the

27 ⁴⁷ The Toshiba entities make reference to Plaintiffs allegations in other industries,
 28 including "LCD, DRAM, SRAM, Flash Memory." Toshiba Mot. at 4. Plaintiffs,
 however, only make allegations as to cases related to the TFT-LCD and DRAM
 industries, cases in which guilty pleas were obtained. See DP-CAC ¶¶ 122-24. The DP-
 CAC does not rely on the civil actions against certain Toshiba entities and other
 Defendants here in cases related to the SRAM and Flash Memory industries.

DP-CAC expressly implicates it in a non-conclusory manner. The standard for obtaining a criminal conviction (as well as the reasons for initiating a criminal investigation) is different from that for sustaining a civil complaint. *See also* note 38, *supra*. Moreover, as discussed further below, Toshiba had exited production by the time in 2007-08 that the investigations began. In 2007 it sold its one-third interest in Matsushita Toshiba Picture Display Co., Ltd. (“MTPD”), which was its CRT manufacturing entity.⁴⁸

ii. **Allegations Regarding The Toshiba Entities’
Market Dominance Do Not Sufficiently
Distinguish Them from Other Defendants**

The second area of the DP-CAC upon which Toshiba seeks to distinguish itself from the other Defendants is with respect to their respective shares of the CRT Products market. First, Toshiba bickers with the well-established principle that allegations of market dominance are often a key component of antitrust complaints and then describes itself as an entity without market power. To the contrary, *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011 (N.D. Cal. 2007) (cited by Toshiba) and similar cases do not stand for the proposition that collective market dominance among defendants is irrelevant to the sufficiency of a complaint. Rather such cases merely explain that collective market dominance alone should be coupled with additional allegations supporting the inference of a conspiracy. *Id.* The DP-CAC certainly contains such additional allegations.

Toshiba also misses the mark with its arguments that its market share was too small to affect price, that there was no interdependence among it and the other Defendants who together controlled approximately 60% of the CRT Products market (LG Product Displays – 27%, Samsung SDI – 24%, Chunghwa PT – 11%), or that, as a small player, it had an incentive to compete with the conspiracy. First, it ignores the express allegation that Toshiba, along with other Japanese producers of CRT Products, controlled

⁴⁸ The Toshiba entities do remain active participants in the LCD Products market, the main successor to the CRT Products market, and the DOJ and foreign antitrust authorities are investigating whether the Toshiba entities participated in a conspiracy to restrain trade in that market.

1 15% of the market – well above the 11% of the market that was control by Chunghwa
 2 PT. Toshiba, like Chunghwa PT, had the choice of using its smaller market share to
 3 either undercut the conspiracy’s pricing (and perhaps gain market share), or instead join
 4 the conspiracy and enjoy inflated prices, which it did.

5 Second, Toshiba ignores the critical role that “small” participants often play in
 6 ensuring the success of a conspiracy. Non-conspiring small players are the proverbial
 7 competitive fringe that can expand output, at the expense of larger entities charging
 8 supra-competitive prices. Under Toshiba’s “must be large market player” reasoning,
 9 only LG Product Displays and Samsung SDI should have conspired but these two only
 10 controlled approximately 50% of the CRT Products market and would have been
 11 undercut on price by smaller players, such as Chunghwa PT and Toshiba, if those smaller
 12 players did not join the conspiracy. It is the *collective* market power, not the individual
 13 market power, of defendants that is critical to an effective conspiracy.

14 In sum, it is not critical for Plaintiffs to have alleged significant market
 15 dominance by the Toshiba entities alone.

16 **iii. Allegations Regarding Pricing and Production**
 17 **Do Not Serve a Basis for Distinguishing The**
 18 **Toshiba Entities from Other Defendants**

19 Toshiba also seeks to distinguish itself from the other Defendants with respect to
 20 allegations about pricing increases and production cuts. First, while Defendant-specific
 21 pricing and production allegations lend added heft to Plaintiffs’ claims about the
 22 conspiracy, those allegations primarily supplement Plaintiffs’ core allegations (*e.g.*,
 23 Defendant meetings; C.Y. Lin’s indictment). These Defendant-specific allegations are
 24 coupled with an equal number of pricing and production allegations applicable to all
 25 Defendants, including Toshiba. *See, e.g.*, DP-CAC ¶¶ 188-97 (describing price stability
 26 or increases for all CRT Products).⁴⁹

27 ⁴⁹ It is also worth noting that Toshiba’s joint venture, MTPD, is one of the Defendants
 28 specifically identified as decreasing supply in furtherance of the conspiracy. DP-CAC ¶
 183. While Toshiba changed the form of its participation in the CRT manufacturing
 business in 2002 when MTPD was established, Toshiba had a one-third ownership of

iv. **Allegations Of Participation In Express
Conspiratorial Meetings, As Well As Meetings
Providing An Opportunity To Conspire, Are
Made With Respect To Toshiba.**

Toshiba's fourth point is that the DP-CAC's lack of explicit detail concerning their misuse of trade associations is exculpatory in view of the allegations that LG and Samsung furthered the conspiracy through their membership in two Korean trade associations. First, this arguments fails to recognize that the DP-CAC contains express allegations about how and when the conspiratorial meeting (*e.g.*, "Glass Meetings") took place. DP-CAC ¶¶ 134-53. Hence, Plaintiffs here do not need to rely on allegations about trade associations or trade shows as providing opportunities for Defendants to conspire. In any event, while the LG and Samsung Defendants are expressly referenced as being members of these two Korean trade associations, the DP-CAC does allege that attendance at other industry trade shows was indeed open to and provided the means for numerous Defendants, including the Toshiba entities, and not just the LG and Samsung Defendants, to further the conspiracy. *Compare, e.g.*, DP-CAC ¶ 178 (top executives of LG and Samsung attending Korean Display Conference) *with* ¶ 179 ("[o]ther opportunities to collude among Defendants were provided by event sponsored by the Society for Information Display. . . ."). Moreover, a Defendant could participate in a conspiracy to fix prices even if it did not attend trade association meetings. Attendance at such meetings has never been held to be a requirement to participate in a conspiracy.

b. **The Amended Complaint Adequately Alleges
Participation In The Claimed Conspiracy By Each Of
The Toshiba Entities**

Toshiba seeks to challenge the DP-CAC on the grounds that it does not sufficiently detail the role played by each Toshiba entity in the alleged conspiracy. That argument is based on the claim that *Twombly* and *Kendall* do not permit a "bare

MTPD and had an interest in MTPD continuing the conspiracy that the Toshiba entities actively participated in from 1996 through 2003. As noted above, MTPD does not seek to dismiss the complaint on the ground that it fails to state a plausible conspiracy.

1 allegation of conspiracy” to be maintained against a defendant because such an allegation
2 is “almost impossible to defend against.” Toshiba Mot. at 9 *citing Kendall*, 518 F.3d at
3 1047. Toshiba goes on to cite *Kendall*, arguing that a complaint must always provide the
4 “who, did what, to whom (or with whom), where, and when” for each defendant. *Id.*

5 Toshiba errs when it argues that the ostensible who/what/where/when-
6 requirement imposed by *Kendall* is not satisfied by the DP-CAC as to each Toshiba
7 entity. *Kendall*, addresses the need for who/what/where/when allegations when the
8 underlying complaint (unlike here) offers no more than the bare assertion of conspiracy
9 following from parallel pricing, without any allegation about how the alleged
10 conspiratorial agreement was reached, implemented, carried out, or policed. Here, of
11 course, there are significant allegations about such matters, including the total number of
12 conspiratorial meetings, the number of conspiratorial meetings attended by each
13 Defendant and its affiliates, the means by which information was collected for and
14 disseminated at such meetings, and, of course, corroboration of the existence of such
15 meetings by C.Y Lin’s indictment. DP-CAC ¶¶ 134-53, 126.

16 As noted above, in several post-*Kendall* cases in this District that have considered
17 the issue of Defendant-specific allegations – cases not only similar to the instant case but
18 also involving many of the same Defendants (and in one case involves a conspiracy that
19 essentially overlaps with the conspiracy alleged here) – this Court has consistently held
20 that allegations such as those in the DP-CAC are sufficient. The Toshiba entities,
21 however, disregard these on-point cases.

22 The essence of Toshiba’s argument is that the DP-CAC does not recite each
23 Defendant’s name enough times to allege sufficiently its participation in the price fixing
24 conspiracy. Curiously, in their discussion of this issue, the Toshiba entities begin their
25 analysis of cases applying *Twombly* (and *Kendall*) with *TFT-LCD I*, saying that the
26 amended complaint must allege that each individual defendant joined the conspiracy and
27 played some role in it. But, as noted above, Toshiba then fails to recognize that Judge
28 Illston in *TFT-LCD II* (discussed above), after considering the same cases that

1 Toshiba now cites, ultimately rejected the proposition that, in the context of a motion to
2 dismiss, plaintiffs are required to provide detailed allegations as to each defendant.

3 Because, as noted above, the DP-CAC contains virtually identical allegations in
4 connection with the (predecessor) conspiracy for TFT-LCD Products, it necessarily
5 follows that the DP-CAC is sufficient as to the Toshiba entities. In particular, Plaintiffs'
6 allegations here that "Toshiba, through TC and TDDT, participated in over 50 bilateral
7 and group meetings between 1995 and 2003..." (DP-CAC ¶ 171) and that "[t]he
8 individual participants entered into agreements on behalf of, and reported these meeting
9 and discussions to, their respective corporate families" (DP-CAC ¶ 154) were the kinds
10 of allegation held sufficient in *TFT-LCD II*. The latter allegation regarding employees of
11 various corporate families acting as agents for each other is particularly proper in light of
12 the express allegation that attendees at conspiratorial meeting, such as the "Glass
13 Meetings," "the individual participants . . . did not always know the corporate affiliation
14 of their counterparts, nor did they distinguish between entities within a corporate family."
15 (DP-CAC ¶ 154.)⁵⁰ Likewise, Toshiba should not be heard to argue (as it did in *Flash*
16 *Memory* and *SRAM*) that the DP-CAC is deficient with respect to the Toshiba
17 subsidiaries such as TAI, TAEC, TAIS, or TAEC on the grounds that "Plaintiffs do not
18 identify the time of the meeting, where the meeting occurred, or the other parties to the
19 agreements." Toshiba Mot. at 13-14. Finally, as noted above, the key cases upon which
20 Toshiba relies are easily distinguishable; particularly because those cases involved
21 complaints that rested solely on allegations of parallel conduct.

22 In sum, the allegations in the DP-CAC are more than specific enough to put the
23 Toshiba entities on notice of the claims against them, including participation in the
24
25

26 ⁵⁰ Plaintiffs rely on principles of agency, including direct misconduct among and between
27 employees of the various Toshiba companies (*see, e.g.*, DP-CAC ¶¶ 154, 171-72), and,
28 therefore do not address here Toshiba's argument regarding alter-ego theories of liability
(Toshiba Mot. at 11-12).

1 alleged conspiracy with the other identified Defendants, at the identified meetings, during
2 the 1995-2003 time period.⁵¹

3 **c. Toshiba's Withdrawal Argument Is Unavailing.**

4 Toshiba also argues that it should be dismissed because it withdrew from the
5 conspiracy in 2002, more than four years before Plaintiffs' amended complaint was filed,
6 by exiting the CRT Products market when they formed a joint venture, MTPD, with
7 Matsushita Electronics, Inc. ("MEI"). Toshiba Mot. at 18-20. Those arguments,
8 however, are not well taken. The applicable law has been explained above in response to
9 BMCC. (Section II.E.1.b.i. *supra*). Toshiba's arguments are no more availing. Indeed,
10 even the cases cited by Toshiba (*Morton's Market*, *Antar*) recognize that continued
11 receipt of benefits from the conspiracy (here, participation and payment from MTPD) is
12 incompatible with a claim of withdrawal.

13 Even assuming that the DP-CAC allegations about Toshiba Corp. forming MTPD
14 with MEI in 2002 resulted in all the Toshiba entities ceasing active participation in all of
15 the CRT Products market (*i.e.*, exiting the CRT television and computer display market,
16 as well as the CRT component market), the DP-CAC does not show unequivocal
17 abandonment by the Toshiba entities of all of the benefits of the CRT Products
18 conspiracy. Indeed, the exact opposite is alleged, *i.e.*, that the Toshiba entities maintain a
19 one-third interest in the MTPD. Thus, to the extent MTPD continued the conspiratorial
20 practices begun prior to the Toshiba entities' supposed exit from the CRT Product
21 market, they would indeed remain the beneficiaries of their prior conspiratorial conduct.
22 Therefore, it cannot be said the DP-CAC shows on its face an effective withdrawal. At a

23 ⁵¹ To the extent that Toshiba's argument on this issue is based on whether specific
24 Toshiba companies were (or were not) the subject of criminal investigations in the TFT-
25 LCD market (Toshiba Mot. at 16-17), it repeats the argument addressed above. For the
26 same reason that argument lacks merit with respect to the sufficiency of allegations as to
27 the participation in the conspiracy by the Toshiba entities generally, it also lacks merit
28 with respect to the need for more detailed, defendant-specific allegations as to each
Toshiba entity's participation in the conspiracy. *See also Flash Memory*, 2009 WL
1096602 at *11-*12 (explaining why allegations of misconduct in one market can, in
some instances, support allegations of misconduct in another, arguably unrelated
market.).